86-629

No. ____-_____

IN THE

Supreme Court of the United States

October Term, 1986

SEATTLE MASTER BUILDERS ASSOCIATION, et al.,
Petitioners,

v.

PACIFIC NORTHWEST ELECTRIC POWER
AND CONSERVATION PLANNING COUNCIL,
Respondent,

UNITED STATES OF AMERICA,
Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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125 pp

I. QUESTIONS PRESENTED

This case arises under the Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94 Stat. 2697, 16 U.S.C. §§ 839-839h (1980) ("Act"). The Act deals with electric power development. This case concerns the authority and actions of the Pacific Northwest Electric Power and Conservation Planning Council ("Council"), a state governor appointed body established under the Act. The Act calls for the Council to share with the federal Bonneville Power Administration ("BPA") responsibility for developing and implementing an electric energy development and conservation plan. Jurisdiction to review the Council's authority and actions is vested exclusively in the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"). 16 U.S.C. § 839f(e)(5). As other Courts of Appeal are precluded from direct consideration of the Council's authority and actions, this petition is the first and likely only opportunity for this Court to review the following three questions:

1. Whether state governor appointment of an agency may be upheld under the Appointments Clause and national supremacy principles of the United States Constitution, when that agency's only authority is over a federal agency's execution of federal law, with state and local agencies free to ignore the dictates of the state governor appointed agency.

2. Whether an agency may be exempted from National Environmental Policy Act and state environmental impact statement requirements for its adoption of energy conservation requirements and other measures that admittedly affect the environment, when: (1) the federal law that establishes the agency's powers and duties expressly requires construction of those powers and duties "in a manner consistent with applicable environmental laws;" and (2) the United States Circuit Court holding that the agency's action does not substantially impact the environment conflicts with the test for substantial impact adopted by other Circuit Courts.

3. Whether an agency may be permitted through a "reasonable" statutory interpretation to require energy conservation measures that satisfy only one cost criterion, when the federal statute's language requires they satisfy two criteria, and the independent purpose of each criterion is apparent from the legislative history.

II. LIST OF PARTIES

Petitioners are Seattle Master Builders Association, Homebuilders Association of Spokane, Inc., National Woodwork Manufacturers' Association, Fir & Hemlock Door Association, Shelter Development Corporation, Clair W. Daines, Inc., Conner Development Company, Donald N. McDonald, Seattle Door Company, Inc., and Homebuilders Association of Washington State.

The Respondent is the Pacific Northwest Electric Power and Conservation Planning Council.

The Intervenor-Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners Seattle Master Builders Association, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit's divided opinion as amended, reported at 786 F.2d 1359, appears in Appendix A to this petition.

JURISDICTION

The Ninth Circuit's split decision was rendered on April 10, 1986, and thereafter amended by order dated June 11, 1986. Timely petitions for rehearing and suggestions for

rehearing *en banc* filed by the Petitioners and Intervenor-Respondent United States were denied on July 8, 1986, and this petition for certiorari was filed thereafter within 90 days. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following constitutional provisions, statutes and regulations are at issue in this case. The relevant portions of each are included in Appendices C through O.

United States Constitution, Art. I, § 10, cl. iii ("Compacts Clause") (Appendix C).

United States Constitution, Art. I, § 2, cl. ii ("Appointments Clause") (Appendix D).

16 U.S.C. §§ 839-839h (Pacific Northwest Electric Power Planning and Conservation Act) ("Act") (Appendix E).

42 U.S.C. §§ 4331 - 4332 (National Environmental Policy Act or "NEPA") (Appendix F).

1983 Pacific Northwest Conservation and Electric Power Plan, Vol. I, II & IV ("Plan") (Appendices M through O).

Wash. Rev. Code §§ 43.21C.020 to .031 (Washington Environmental Policy Act) (Appendix G).

Mont. Code Ann §§ 75-1-102 to 2-201 (Montana Environmental Protection Act) (Appendix H).

Idaho Code §§ 61-1201, -1203 (enabling Idaho to participate on the Pacific Northwest Electric Power and Conservation Planning Council) ("the Council") (Appendix I).

Mont. Code Ann §§ 90-4-401, -402 (enabling Montana to participate on the Council) (Appendix J).

Or. Rev. Stat. § 469.800 (enabling Oregon to participate on the Council) (Appendix K).

Wash. Rev. Code §§ 43.52A.018-.040 (enabling Washington to participate on the Council) (Appendix L).

INTRODUCTION

This case arises under an act described by its congressional sponsors as "without doubt . . . the most important bill ever to have affected the Pacific Northwest." 125 *Cong. Rec.* S11592 (daily ed. Aug. 3, 1979) (remarks of Sen. Hatfield). The case concerns issues of vital importance to the region and the nation.

To begin, the Ninth Circuit has held that the Appointments Clause places no limits on Congress' right to delegate the President's appointment power to state governors. The Ninth Circuit has upheld the right of the Council, a state governor appointed body, to control execution of the Act, a federal law, by the Bonneville Power Administration ("BPA") Administrator, a federal officer. Yet, the Council has no authority to control the related actions of state and local agencies. Our Constitution's Framers expressly denied Congress the power the Ninth Circuit has upheld, because they feared the consequences for effective national government of permitting such state control of the execution of national law. Especially given recent and proliferating state demands for greater control over the execution of national law, the Ninth Circuit's holding threatens to unravel the Framers' intended separation of powers between the state and national governments. Equally important, the holding threatens to weaken dangerously the Executive branch vis-a-vis the Legislative branch within the national government.

In addition, the Ninth Circuit has departed in two important respects from Congress' carefully wrought solution to Pacific Northwest energy woes, and in a fashion with national implications. First, the Ninth Circuit has exempted the Council from any environmental impact statement ("EIS") requirement for its fundamental planning function. This holding: (1) is inconsistent with Congress' expressed intent for application of environmental law requirements; (2) is irreconcilable with the rule that EIS exemptions may be found only from the clearest evidence of congressional intent; and (3) rests on a test for substantial environmental impact that

conflicts with the tests employed by other Circuit courts, and could produce a gutting of EIS protections. Second, the Ninth Circuit has swept away the Act's express protection for consumers against excessive conservation costs. This holding rests on: (1) an unwarranted application of the administrative law principle of deference to agency statutory interpretation; and (2) a clearly erroneous reading of legislative intent. The result is a rule of deference that permits an administrative agency to rewrite statutes at will, and at a cost of hundreds of millions of dollars to Pacific Northwest housing consumers.

STATEMENT OF THE CASE

This statement describes the origin of the Act, and how Congress, the Council, and the Ninth Circuit, in turn, dealt with the three matters underlying the issues in this case: (1) the Council's appointment and authority; (2) accountability for environmental impacts of action taken under the Act; and (3) allocating the economic benefits and costs of energy conservation, as required under the Act.

Under the Bonneville Project Act of 1937, 16 U.S.C. §§ 832-832l, and subsequent legislation, BPA for over 40 years marketed hydroelectric power generated from federally owned dams on the Columbia River. Purchasers included publicly and privately owned utilities, industries such as aluminum manufacturers, federal agencies in the Pacific Northwest, and customers outside the region. Through the early 1970's this hydroelectric power system, augmented by power generating facilities owned and operated by some local utilities, provided sufficient power for all customers.

Eventually, increasing demand threatened to exceed the system's maximum generating potential. By the late 1970's, it was generally believed that the Pacific Northwest faced serious electric power shortages. As BPA lacked the authority to acquire additional power generating facilities, it began to prepare a program for administrative allocation of federal power supplies. These supplies were much cheaper than alternatives, and competition among potential claimants for

the largest possible share threatened to disrupt the system through prolonged litigation.[1] The Act was the solution. *ALCOA v. Central Lincoln Peoples' Util. Dist.*, 104 S. Ct. 2472, 2478 (1984).

1. Congress and the Act.

A. Council Appointment and Authority.

It was generally agreed that the remedy for the region's energy woes would have to include empowering BPA to acquire resources to increase the supply of federal power. *See* M. Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 Wash. L. Rev. 175, 229-30 (1983) ("Blumm"); *cf. ALCOA*, 104 S. Ct. at 2478. However, this approach raised concerns that BPA would become the region's energy "czar," with a role akin to the TVA's in the Southeast. *E.g.*, Foley Statement, *supra*, n.1, at H9863. The Pacific Northwest over 30 years before rejected such a "Columbia Valley Authority." Blumm, 58 Wash. L. Rev. at 207-08. A looming power crisis had not changed most minds. *See* Foley Statement at H9863-64.

The Council was the solution. The Council would prepare a regional electrical power plan ("Plan"). 16 U.S.C. § 839b(d)(1). In general, BPA actions to acquire energy resources would have to be consistent with the Plan. 16 U.S.C. § 839b(d)(2). In particular, BPA would have to implement energy conser-

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[1] *See, e.g.*, House Committee on Interstate and Foreign Commerce, *Report No.* 976 (Pt. I), 96th Cong., 2d Sess. 23-27 (1980), *reprinted in part in* 1980 U.S. Code Cong. & Ad. News 598-93 ("House Commerce Report"); House Committee on Interior and Insular Affairs, *Report No.* 976 (Pt. II), 96th Cong., 2d Sess. 26-32 (1980), *reprinted in part in* 1980 U.S. Code Cong. & Ad. News 6023-30 ("House Interior Report"); Senate Committee on Energy and Natural Resources, *Report No.* 272, 96th Cong., lst Sess. 17-18 (1979) (Bonneville Power Administration Library, 1981) ("Senate Report"); 126 *Cong. Rec.* H9862-64 (daily ed. Sept. 29, 1980) (remarks of Rep. Foley) ("Foley Statement").

vation measures required by the Plan. 16 U.S.C. § 839d(a)(1).[2] In the event of a dispute between the Council and BPA, the Council would be able to force BPA to make a final decision, subject to court challenge (e.g., by the Council) for failure to comply with the Plan. *See* 16 U.S.C. § 839b(j). The Council's authority, however, would be only over BPA; state and local governments were expressly exempted from complying with the Plan. *See* 16 U.S.C. 839g(a)[3]

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[2] BPA's discretion is particularly limited in this regard. Under the Act, conservation is treated like a 1,000 megawatt thermal generating plant; just another resource. 16 U.S.C. § 839a(19). The Act, in turn, distinguishes between major and minor resources: a resource that represents 50 megawatts per year over at least five years is a major resource. 16 U.S.C. § 839a(12). While BPA major resource acquisitions are subject to Council veto (the only relief is an act of Congress), BPA may acquire minor resources that are inconsistent with the Council's Plan, so long as they are consistent with the Act. *Compare* 16 U.S.C. § 839d(c)(3)(B) *to* 16 U.S.C. § 839d(b)(2) (BPA discretion regarding minor resources) This would appear to relieve BPA from complying with the Plan's conservation requirements. Residential conservation is made up of thousands of individual measures (e.g., triple-pane glazing on a window), and none of those alone is a major resource. However, the Act expressly provides that BPA's discretion regarding minor resources *does not extend to energy conservation: the BPA must comply with the Plan's conservation requirements.* *See* 16 U.S.C. § 839d(b)(5).

[3] Congress never wavered from its commitment to a council with the power to control BPA actions. *See* House Interior Report at 33, 35-36; House Commerce Report at 28, 33; Senate Report at 14, 15; Foley Statement at H9863-64. However, Congress did waver from state governor appointment of Council members. The first version of the Council proposed state governor appointment. *Id.* at H9863. After the United States Department of Justice objected on Appointments Clause grounds, appointment by the Secretary of Energy was substituted. *Id.* However, this was unsatisfactory to many, because only state governor appointment could provide the desired check over BPA. *See id.* After Congress concluded that the Appointments Clause was supposedly irrelevant to the separation of powers between the state and national governments, it restored state governor appointment. *See id.* at H9863-64; *see also* House Interior Report at 70 (supplemental views of Rep. Williams, sponsor of amendments restoring state governor appointment).

B. Environmental Accountability.

Congress recognized that a major aspect of the energy problem confronting the Pacific Northwest was obtaining future power supplies "in an economical *and environmentally responsible manner.*" 125 *Cong. Rec.* H2059 (daily ed. Apr. 5, 1979) (remarks of Rep. Ullman) (emphasis added). It therefore declared an independent purpose of the Act would be to "provide... environmental quality" through the cooperation of government, electricity consumers, and the general public. 16 U.S.C. 839(3)(C). It required the Act be construed "in a manner consistent with applicable environmental laws." 16 U.S.C. § 839. It provided no exemption for the Council from EIS requirements.

C. Allocating Energy Conservation Benefits and Costs.

Congress was concerned about the cost of future power supplies. *E.g.*, 125 *Cong. Rec.* H2059 (daily ed. Apr. 5, 1979) (remarks of Rep. Ullman). Congress at first required that conservation be "cost effective for consumers." Senate Report, *supra*,, n.1, at 21. However, this requirement proved inadequate. "Cost effective," was defined in terms of "cost comparisons among and between alternative measures and resources," while "cost effective for consumers" in the conservation area was a function of the comparison between the cost of conservation and the savings produced by compliance. *See id.* at 21, 25. These definitions demonstrate that Congress had two cost concerns; assuring maximum savings for the region, without imposing an economic burden on individual consumers. A conservation measure might be cost-effective for the region, yet cost consumers more than the electricity saved. The single requirement of "cost effective for consumers" did not address both concerns.

Congress therefore changed the Act to require that conservation be *both* "cost-effective for the region and economically feasible for consumers." 16 U.S.C. § 839b(f)(1). Congress further required, as a precondition to implementing

conservation measures, that consumers be reimbursed when the cost of any measure exceeded the value of electricity saved. *Id. See* House Interior Report, *supra*, n.1 at 73; 126 *Cong. Rec.* H9853 (daily ed. Sept. 29, 1980) (remarks of Rep. Swift).

2. The Council, The Act, And The Plan.

A. Council Appointment and Authority.

The Council was constituted in 1983 through its appointment by the governors of four member states. *See* 16 U.S.C. § 839b(a)(2). The Council's interpretation of its authority over BPA was and is that BPA must conform to the Plan's resource acquisition requirements, including the Plan's residential energy conservation standards. Council Reply Br. at 5-12 (all brief and petition excerpts reproduced in Appendices P through T).

B. Environmental Accountability.

The Council admitted that the Plan's residential conservation requirements could increase environmental hazards, such as greater concentrations of pollutants in homes due to reduced ventilation. *See* Plan Vol. I at 9-2. More generally, the Plan requires BPA to acquire between 1,000 and 11,000 megawatts of additional energy resources over 17 years (including such resources as new coal-fired generating plants). *Id.*, figs 5-1 to 5-4. Notwithstanding these impacts, the Council declined to prepare either a state or federal environmental impact statement.

C. Allocating Energy Conservation Benefits and Costs.

Before the Plan's adoption, the Council repeatedly stated that the Act required reimbursement to consumers when the cost of any conservation measure exceeded the value of electricity saved, even though the measure might be cost-effective for the region. Mtg. 7, T. at 1a-14 to 15, 1b-4 to 1b-9; Conservation Subcommittee, minutes, May 21, 1982 at 4 (Doc.

233/01396); Mtg. 36, M. at 1, 4; Doc. 440/04494 at 2-3 (reproduced in Appendices U through X). The adopted Plan ignores this requirement. Although the Plan requires conservation measures whose costs exceed electricity savings, *see infra*, at 30, n.21, the Plan provides no reimbursement. Plan Vol. I, 7-1, 10-4 to 10-11.

3. Ninth Circuit Proceedings.

On July 29, 1983, the Petitioners began this action in the Ninth Circuit against the Council. *See* 16 U.S.C. § 839f(e)(5) (Ninth Circuit jurisdiction). Upon notice of the challenge to the constitutionality of the Council's appointment, the United States intervened.[4]

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[4] The Ninth Circuit opinion states that the Petitioners sought relief against both the Council and "the United States government," 786 F.2d at 1362, and Judge Beezer's dissent states that the United States "intervened on behalf of the Council." *Id.* at 1371. Neither statement is correct.

First, contrary to the majority suggestion, the Petitioners' case involves no claim for relief from BPA authority or actions. Second, contrary to Judge Beezer's suggestion, the United States did *not* intervene unqualifiedly on the Council's behalf. The United States, in opposition to the Petitioners *and* the Council, intervened to urge the Ninth Circuit not to decide the issue of the constitutionality of the Council's appointment. In particular, the United States argued, in opposition to the Council and the Petitioners, that the constitutional issue was not ripe, and that the Petitioners lacked standing to raise it. *Compare* United States Br. at 23-29 *to* Council's Reply Br. at 5-13, Petitioners' Reply Br. at 36-39. The United States reiterated these positions in its petition for rehearing and suggestion for rehearing *en banc*. United States Pet. at 6-13. *See also, infra*, n.6 (discussing merit of United States' ripeness and standing objections).

However, the United States also gave what was at least a strong hint of its views on the merits. Those views — taken in opposition to the Council, *not* the Petitioners — were that the United States had grave doubts about the constitutionality of the Council's appointment, given a Council action binding on BPA. United States Br. at 12-23. Moreover, the United States reiterated those doubts even more strongly when urging rehearing. United States Pet. at 6-7, 9, 11, n.6, 13.

A. Council Appointment and Authority.

The Ninth Circuit affirmed the constitutionality of the Council's appointment. It rejected an Appointments Clause challenge, holding that: (1) the Clause concerns only the separation of powers between branches of the national government; and (2) the Clause bars only attempts by Congress to exercise itself the power to appoint executive officers. 786 F.2d at 1365.

B. Environmental Accountability.

The Ninth Circuit affirmed the Council's decision not to prepare an EIS. It held that: (1) as the Council is a creature of an interstate compact, it is not required to conform to state EIS requirements; and (2) the Council also is not required to prepare an EIS under the federal National Environmental Policy Act, because the Council had taken no "substantial federal action" affecting the environment. 786 F.2d at 1371.

C. Allocating Energy Conservation Benefits and Costs.

The Ninth Circuit affirmed the Council's refusal to reimburse consumers when conservation measure costs exceeded electrical savings. It held that: (1) the Council's interpretation of the Act was entitled to substantial deference; and (2) the Council's refusal was a reasonable interpretation of what the court characterized as the Act's goal of "economic efficiency." 786 F.2d at 1367-1369.

REASONS FOR GRANTING THE WRIT

There are three reasons why the Court should issue a writ of certiorari to review the judgment and opinion of the Ninth Circuit in this case.

1. The Ninth Circuit Has Authorized a State-Governor Appointed Body to Control Solely a Federal Agency's Execution of Federal Law, in Contravention of the Appointments Clause and Supremacy Principles of the United States Constitution.

Under the Act, the Council's residential conservation requirements (Model Conservation Standards, or "MCS") only bind BPA; state and local government is expressly exempted from compliance. *Compare, e.g.*, 16 U.S.C. § 839d(a)(1) *to* 839g(a). *See also supra* at 6, n.2, 7, n.3. Moreover, the Ninth Circuit agreed that BPA conservation-related actions must be consistent with the Plan. 786 F.2d at 1362.[5,6] Yet the

[5] The Ninth Circuit stated that it did not "reach" the question whether the Council "exercise[s] significant authority over federal government actions." 786 F.2d at 1365. If this statement means that the Ninth Circuit ruling assumes, *but does not decide*, that the Council's residential conservation requirements are binding on BPA, then it should be reviewed by this Court for another reason, relating to fundamental questions of federal court jurisdiction. If the requirements are *not* binding on BPA, then the "clean bill of constitutional health" the Ninth Circuit gave the Council violates basic bars against gratuitous rulings on constitutional issues, *see, e.g., Ashwander v. TVA*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring), and constitutes an advisory opinion, beyond the power of a federal court to offer.

[6] As previously indicated, *supra*, n.4, the United States argued that no decision on the constitutionality of the Council's appointment should have been made in this case, purportedly because the issue was not ripe, and the Petitioners had no standing to raise it. These claims are without merit. As previously demonstrated, *supra* at 6, n.2, 7, n.3, the plain language of, and congressional intent underlying the Act require BPA to conform to the Plan's conservation requirements: the constitutionality of the Council's appointment is ripe for review. *E.g., Pacific Gas & Elec. Co. v. California Energy Resources Conservation & Dev. Comm'n*, 461

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Ninth Circuit upheld the constitutionality of state governor appointment of Council members. The Ninth Circuit concluded that, because the Council's members purportedly do not serve "pursuant to federal law," there is no violation of what the Ninth Circuit conceded is the Appointments Clause's requirement that the federal Executive appoint those who "exercise significant authority over federal government actions. . . ." *Id.* at 1365. Finding the Council the creature of an interstate compact, the Ninth Circuit dismissed Appointments Clause objections with the sweeping holding that the Clause is only "about maintaining the separation of powers *within the federal government*. . . ." *Id.* at 1363 (emphasis added), 1365.

The Ninth Circuit's holding is the impermissible result of viewing the Council's appointment and authority "through the lens of federalism without the filter of the separation of powers." L. Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues and Controversies About Federalism*, 89 Harv. L. Rev. 682, 683 (1976). Even assuming the Council's appointment and authority are not the product of federal law,[7] the Ninth Circuit gives Congress unfettered discretion to subordinate the federal Executive's administration of national law to state

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U.S. 190, 200-01 (1983). Moreover, as is demonstrated, *infra* at 29, nn.19-21,30, nn.22-23, the Petitioners are suffering actual injury from the Council's promulgation of the Plan's residential conservation requirements; the Petitioners have standing. *E.g., Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72, 74, 77-78 (1978).

[7] In fact, they are. Contrary to the Ninth Circuit's holding, the Council is not the creature of an interstate compact. As Judge Beezer demonstrated in his dissent, the Council's creation does not fit the classic indicia of an interstate compact: (1) its operation throughout the Pacific Northwest can be triggered by the appointment of members by only three of the four states represented; (2) its jurisdiction affects several more states, not represented; and (3) none of the represented states is bound to continue its participation. 786 F.2d at 1372; *see also Northeast Bancorp, Inc v. Federal Reserve Bd.*, 105 S. Ct. 2545, 2554 (1985).

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will. This substantive result cannot be reconciled either with the Framers' original understanding of the dual role the Appointments Clause plays in our federal system of divided power, or with the principle of the supremacy of national law, as established by this Court's many decisions. *Cf. Buckley, supra*, n.7, 424 U.S. at 125-26 (Appointments Clause requirements not a matter of "etiquette" but "substantive"); *Washington v. United States*, 460 U.S. 536, 544 (1983) (resolution of supremacy questions must not "elevate form over substance").

The Framers' fundamental goal was to create an effective, enduring national government. *E.g.*, C. Warren, THE MAKING OF THE CONSTITUTION 4 (1937 ed.). The primary impetus was the danger, in the middle 1780's, that deficiencies in the Articles of Confederation would lead to a breakup of the United States along regional lines. *Id.* at 23-30. Those deficiencies included the requirement of "the concurrence of 13 distinct sovereign wills . . . [for] the complete execution of every important measure" passed by the confederation government. THE FEDERALIST NO. 15 (A. Hamilton) at 98 (J. Cooke ed. 1961). The effective restructuring of the national government was thought to require assuring that "the execution of the laws of the national government" could "pass into immediate operation upon the citizens themselves, without the interposition of state" will. *See* THE FEDERALIST NO. 16 (A. Hamilton) at 103. This, in turn, was believed to depend on sufficient "energy" in the execution of

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Nor would it matter if the Council were a compact creation. Congress' compacts power is merely another legislative power that is subject to Appointments Clause requirements. *Compare* Art. I, § 10, cl. iii (compact power) *with Buckley v. Valeo*, 424 U.S. 1, 131-33 (1976) (*per curiam*). The Appointments Clause is concerned with the substantive issue of who controls the government functions that an executive officer performs. *See Bowshe v. Synar*, 106 S. Ct. 3181, 3188-89 (1986); *Buckley*, 424 U.S. at 125-26; *Synar v. United States*, 626 F. Supp. 1374, 1400 (Scalia, Johnson, Gasch, JJ.), *aff'd, sub. nom Bowsher, supra*. Here, the substantive result of the Council's appointment by state governors is to place in the states' hands control over the government functions BPA's Administrator performs.

that law. *See* THE FEDERALIST NO. 70 (A. Hamilton) at 423. Assuring such energy was thought to require assuring the executive control over the appointment of his or her officers: The Framers recognized that "good laws are of no effect without a good executive," and that "there can . . . be no good executive without a responsible appointment of officers to execute." 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION 538-39 (1911 ed.) ("Farrand") (James Wilson). *See generally id.* at 41-44, 80-83, 314-15, 339.

However, the Framers also recognized that strengthening the national government could threaten the liberties recently won from Great Britain. In particular, the Framers feared the threat posed by enhancing the national government's legislative power. They saw that, under the state constitutions of the day, "[t]he legislative department [was] every where extending the sphere of its activity, and drawing all power into its impetuous vortex . . . ." THE FEDERALIST NO. 48 (J. Madison) at 333. This experience had led them to conclude that the greatest threat to liberty under "republican governments" was "the tendency to an aggrandizement of the legislative, at the expense of the other departments . . . ." *See* THE FEDERALIST NO. 49 (J. Madison) at 341; *see also Bowsher, supra*, n.7, 106 S. Ct. at 3189; *Buckley*, 424 U.S. at 129. The Framers were determined not to make what they believed was the mistake of the state constitution authors who, reacting to the abuses of an "hereditary [executive]," had forgotten the danger of "legislative usurpation." THE FEDERALIST NO. 49 at 341.

The Framers believed a proper division of authority — of separation of powers — would provide sufficient insurance against this threat. For the Executive branch, the Framers saw a strong power to appoint officers as key to preventing legislative encroachment. *See* THE FEDERALIST NO. 51 (J. Madison) at 348; THE FEDERALIST NO. 77 (A. Hamilton) at 516-17; *see also Buckley*, 424 U.S. at 272 (White, J., concurring). More generally, the Framers also relied on a proper division of authority between the state and national governments. As James Madison described the result in THE

FEDERALIST NO. 51: "In the Compound Republic of America, the power surrendered by the people, is first divided between the two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people. . . ." *Id.* at 35.

The Framers, however, did not believe this double security was neatly separable. On the contrary, they thought that a failure in one area could fatally undermine their efforts in the other. This is clearly demonstrated in the Framers' debates over the Executive's appointment power. Not everyone at the Constitutional Convention was happy with the prospect of a strong executive, and some were particularly fearful of the "formidable" nature of the appointment power proposed. 2 Farrand at 405 (Edmund Randolph). In an attempt to reduce appointment power, an amendment was offered, permitting the Legislative branch to delegate appointment power to state governors. *See id.* at 406 (proposed by John Dickinson and Edmund Randolph, as revised by John Sherman). *The amendment was defeated. Id.* at 406, n.12, 407, n.12, 419, n.15. The objections to it demonstrated the Framers' belief that merely diluting the prerogatives of one branch of the national government, without directly transferring them to another, could endanger the effectiveness of the separation of powers. As Gouverneur Morris of Pennsylvania put it, permitting the Legislative branch to authorize state governor appointment of those executing the laws of the United States would be giving the states the power to say, "you shall be viceroys but we shall be viceroys over you." 2 Farrand at 406.[8]

[8] Rejecting this attempt to dilute executive power was consistent with the Framers' resistance throughout the Convention to proposals that threatened to weaken executive effectiveness. For example, the Framers believed that a unitary executive was essential to assuring energy in the execution of national law. THE FEDERALIST NO. 70 at 424, 427. The Framers therefore rejected proposals for a three person executive drawn from separate regions, 1 Farrand at 66, 71-74, 88, 91-92, 97, and proposals that, while maintaining the formality of a unitary executive, undermined its prerogatives by creating bodies of

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The Framers' refusal to permit Congress to delegate Executive appointment prerogatives to state governors demonstrates the indefensibility of the Ninth Circuit's wooden compartmentalization of "federalism," on the one hand, and "separation of powers," on the other.[9] As the Framers' action confirms, questions of federalism are questions about the separation of powers as well, for in our system of government

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counselors with the power to check the executive's actions (e.g., a body of representatives of the country's regions). 2 Farrand at 335-337, 533, 537, 542. The Framers believed that effective unity could be destroyed, even though formally preserved, when an individual was subject, in whole or in part, to the controlling cooperation of others. *See* THE FEDERALIST NO. 70 at 424. These proposals, like the proposal to permit Congress to delegate the appointment power to state governors, suffered from a double defect: (1) they would upset the balance of power within the national government, raising the specter of legislative tyranny; and (2) they would create a structural impetus for the disintegration of the unity of national law, by effectively subjecting that law to unlimited state control.

[9] It also demonstrates the indefensibility of a related formalism: the Ninth Circuit's holding that "the balance of powers between Congress and the President is unaffected" by anything except a Congressional attempt to arrogate to *itself* the power to appoint (or remove) an executive officer. *See* 786 F.2d at 1365. The Framers' express rejection of permitting Congress to delegate the Executive's appointment power to state governors confirms the plain meaning of Madison's statement in THE FEDERALIST NO. 47: "[w]ere the federal Constitution . . . really chargeable with [an] accumulation of . . . all powers legislative, executive and judiciary in the same hands . . . *or with a mixture of such powers having a dangerous tendency to such an accumulation*, no further arguments would be necessary to inspire a universal reprobation of the system." *Id.* at 324 (emphasis added). Madison and his colleagues recognized that the principle of the separation of powers could be violated by *either* "an actual consolidation" *or* "too great a mixture" of the different powers. *Id.* at 331; *see also Buckley*, 424 U.S. at 161-62 (striking down appointment of Federal Elections Commission even though President retained power to appoint two of six voting members). Stripping the Executive of its appointment power and granting it to a third party may not directly strengthen Congress, but it directly weakens the Executive vis-a-vis Congress: a substantively indistinguishable result in the Framers' eyes.

the separation begins with the division of power between the state and national governments. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 439 (1946); *Tennessee v. Davis*, 100 U.S. 245, 266-67 (1880); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819). The Ninth Circuit ignored this fundamental principle and sanctioned a congressional power to dilute Executive appointment prerogatives which the Framers expressly rejected.[10]

Such a power also conflicts with the principle of national supremacy, established by this Court's many decisions. That principle is a logical implication of the structure of our federal system. *Mayo v. United States*, 319 U.S. 441, 445 (1943); *Clallam County v. United States*, 263 U.S. 341, 344 (1923); *McCulloch*, 17 U.S at 426. National supremacy assures uniform administration of national law, thereby avoiding the balkanization (and breakup) of our federal system. *Mayo*, 319 U.S. at 445; *Davis*, 100 U.S. at 266; *Farmers & Mechanics Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875). National supremacy requires the national government be independent of, and therefore free of control by, the states. *Van Brocklin v. Anderson*, 117 U.S. 151, 155 (1886); *New York ex rel. Bank of Commerce v. New York City and County Comm'rs for Taxes and Assessments*, 67 U.S. (2 Black) 620, 632 (1863); *McCulloch*, 17 U.S. at 427, 432. The states therefore may neither tax nor otherwise regulate the national government's instrumentalities. *Compare, e.g., Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 395 (1983); *United States v. Mississippi State Tax Comm'n*, 421 U.S. 599, 604 (1975); *Colorado Dept. of Employment v. United States*, 385 U.S. 355,

[10] The Ninth Circuit refused to address the Framers' rejection of congressional delegation of the Executive's appointment power to state governors, even after: (1) the Framers' action was raised by the United States and the Petitioners, in their briefs filed before oral argument, United States Br. at 18-19, n.5; Petitioners Reply Br. at 22-23; (2) it was raised again by the United States and the Petitioners, in their petitions for rehearing, United States Pet. at 11, p. 6; Petitioners Pet. at 3-4, p. 2; *and* (3) it was incorporated by special order in Judge Beezer's dissent. *See* Order (June 11, 1986) (reproduced in Appendix B); 786 F.2d at 1374, n.3.

358 (1966) (invalidating taxation), *with, e.g., Mayo,* 319 U.S. at 447; *Johnson v. Maryland,* 254 U.S. 51, 53 (1920); *Farmers & Mechanics Nat'l Bank,* 91 U.S. at 33 (invalidating regulation).[11]

The operative principle in supremacy jurisprudence is the same as that articulated by Gouverneur Morris in his successful opposition to permitting Congress to delegate the Executive's appointment power to state governors: the states cannot be permitted to become the viceroys over the intended viceroy for execution of national law—the federal Executive. The notion of the states controlling federal executive authority in our federal system is the antithesis of supremacy. *Van Brocklin,* 117 U.S at 155; *Weston v. Charleston,* 27 U.S. (2 Pet.) 449, 465-66 (1829). Such control creates an intolerable risk of the politically irresponsible exercise of power, to the disadvantage of the national interest. When a state acts under its general law, it binds its citizens as well as others within its jurisdiction. However, when a state exercises authority over the national government, it is regulating something without representation in state government — the national interest. The resulting (likely irresistible) temptation to abuse the national interest for local advantage is precisely the evil the Framers sought to eradicate in forming "a more perfect union." The principle of supremacy of national law is an essential means to that end, because it forbids discriminatory

[11] Admittedly, the scope of this immunity has been disputed over the years. *See, e.g., United States v. Fresno County,* 429 U.S. 452, 457-464 (1977). However, this Court has consistently held that national supremacy has two, minimum components: (1) the states presumptively may not tax or otherwise regulate the governmental operations of the national government, *e.g., United States v. New Mexico,* 455 U.S. 720, 733-735 (1982); *Thomson v. Union P. R.R.,* 76 U.S. 579, 589 (1870); *McCulloch,* 17 U.S. at 436; and (2) the states may not discriminate against national rights and powers. *E.g., Memphis Bank & Trust Co.,* 459 U.S. at 398; *Phillips Chem. Co. v. Dumas Indep. School Dist.,* 361 U.S. 376, 377 (1960); *Testa v. Katt,* 330 U.S. 386, 392-93 (1947). At the least, the states are barred from regulating national rights and powers *standing alone. Fresno County,* 429 U.S. at 703; *Nash v. Florida Indust. Comm'n,* 389 U.S. 235, 239-40 (1967); *North Dakota ex rel. Flaherty v. Hanson,* 215 U.S. 515, 524 (1910).

state control over the national rights and powers. *See Washington*, 460 U.S. at 545-46; *Fresno County, supra*, n.11, 429 U.S. at 458-59, 463 n.11, 464; *McCulloch*, 17 U.S. at 428-29, 435.[12]

The Ninth Circuit's holding violates all of these principles. BPA is a core executive agency: its Administrator is appointed by the Secretary of Energy, with no limit placed on the Secretary's (and therefore the President's) power of removal. 16 U.S.C. § 832a(a); *see Bowsher*, 106 S. Ct. at 3188. The Council's power extends only over BPA: the Act expressly frees the states from any obligation to conform to the Council's plan. The result is that the states, through the Council, have been made the viceroys over BPA's execution of the Act. This is precisely what the Framers feared might result if Congress were permitted to delegate the Executive's appointment power to state governors. The Council's appointment by state governors cannot be reconciled with the supremacy implications of the Appointments Clause. Given the increasing demands for state control over the execution of national law

[12] Congress has some power to waive the national Executive's immunity from state control, at least when the intention to waive that immunity is clearly and unambiguously expressed. *Hancock v. Train*, 426 U.S. 167, 179 (1976); *Kern-Limerick, Inc. v. Scurlock*, 347 U S. 110, 122 (1954). However, this Court has indicated that Congress' waiver power may be subject to constitutional limits. *Federal Land Bank v. Kiowa County Bd. of Comm'rs*, 368 U.S. 146, 149 (1961); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 478 (1939); *cf. Garcia v. San Antonio Metropolitan Transp. Auth.*, 105 S. Ct. 1005, 1016, 1020 (1985). Such limitations are particularly appropriate when the regulation of the national right or power at issue is a product of combined congressional-state action. *Cf. Prudential Ins. Co.*, 328 U.S. at 434-35, 439. The Framers, after all, rejected giving Congress an unlimited power to subject the national Executive to state will through delegation of the Executive's appointment perogative. Thus, while Congress may subject the national Executive to the non-discriminatory exercise of general state law, *see, e.g., California v. United States*, 438 U.S. 645, 650, 652, n.7 (1978), it may not subject the national Executive to politically irresponsible state power. *Cf. McCulloch*, 17 U.S at 428.

in a wide array of areas, now is the time to prevent an unraveling of the fabric of our system of divided powers.[13]

[13] The Ninth Circuit, in upholding the Council's appointment by state governors, concluded by extolling the virtues of "cooperative federalism," particularly under interstate compacts. 786 F.2d at 1366. However (and again assuming the Council is a creature of an interstate compact, *but see, supra*, n.7), this suggestion that the utility of the Council's present manner of appointment should matter in determining its conformity with the separation of powers ignores that the utility of a particular measure or action cannot exempt it from the mandate of the separation of powers, including the requirement of national supremacy. *Compare, e.g., Bowsher*, 106 S. Ct at 3193-94 *with Free v. Bland*, 369 U.S. 663, 666 (1962).

Consistent with its injection of the utility of state governor appointment to efforts at "cooperative federalism," the Ninth Circuit claimed striking down the Council's appointment would "outlaw virtually all compacts. . . ." 786 F.2d at 1365. This is incorrect. Numerous compacts function effectively without the benefit of any control over the national Executive. *E.g.*, 42 Stat. 174, 180 (1921) (Port Authority of New York Compact). Many others function effectively while exercising only nondiscriminatory authority over the national Executive. *E.g.*, 75 Stat. 688, 702-03 (1961) (Delaware River Basin Compact).

However, the problem posed by the Council for the separation of powers is not an isolated one. *See, e.g.*, 33 U.S.C. §§ 1501-1524 (Deep Water Ports Act), 1508 (state governor veto over port location approved by Secretary of Transportation). Moreover, the Congress is considering legislation to permit Council-like state authorities to be set up (by compact) across the United States. *See* H. R. 3074, 99th Cong., lst Sess. (July 24, 1985) (proposed Regional Conservation and Electric Power Planning and Regulatory Coordination Act of 1985). Permitting the Ninth Circuit's decision to stand will only postpone the day of reckoning. Failure to act now will likely leave this Court a task of Augean proportions when it moves to restore the Framers' intended separation of powers. *Cf. INS v. Chadha*, 462 U.S. 919, 944-45, (Opinion for the Court), 1003-1015 (Appendix to dissenting opinion of White, J.).

2. The Ninth Circuit's Holding Exempting the Council From National Environmental Policy Act and State Environmental Impact Statement Requirements Ignores the Act's Mandate for Environmental Review, Conflicts with Other Circuit Court Tests for Substantial Impact, and Erodes Important Environmental Protections.

The Council maintains it need not comply with either state or federal environmental law (and may perform such limited environmental review as it sees fit), because it is neither a state nor a federal agency, but rather a creature of an interstate compact. The Ninth Circuit agreed with the Council that its purported status as an interstate compact agency relieved it from complying with state EIS requirements. The Ninth Circuit also found the Council's Plan lacked the requisite substantial impact to trigger federal EIS review. The practical result is that no environmental law requirements apply to the Council. This is contrary to the Act, a departure from the decisions of other Circuit courts and this Court, and endangers important regional and national environmental protections.

a. Congress Intended Council Compliance with Environmental Review Requirements, Irrespective of the Council's Status as a State or Federal Agency.

The Act's declared purposes include assuring environmental quality. 16 U.S.C. § 839(3)(C). The Act expressly requires its construction consistent with applicable environmental laws. 16 U.S.C. § 839. The Act does not exempt the Council from EIS requirements. Yet the Ninth Circuit relieved the Council of any EIS obligation, placing great emphasis on the Council's supposed status as an interstate compact agency. 786 F.2d at 1371.

The Ninth Circuit erred in relying on the Council's status to grant it an exemption from EIS requirements. Even assuming the Council is an interstate compact agency, *but see, supra*, n.7, it is subject to the conditions Congress imposed in the Act. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359

U.S. 275, 281-82 (1959). The Council therefore must comply with the Act's directive that its purposes "be construed in a manner consistent with applicable environmental laws." 16 U.S.C. § 839.[14]

At issue is which environmental law applies. If, as the Ninth Circuit claims, the Council is a compact, "the state-created agency of each state," 786 F.2d at 1371, then state law applies. Wash. Rev. Code § 43.21C.030(2) ("all branches of government of this state... including state agencies"); Mont. Rev. Code Ann. § 75-1-201(1)(b) ("all agencies of the state"). If the Council functions as an agency of the four states, though not under a compact, state law still applies. Wash. Rev. Code § 43.21C.030(2); Mont. Rev Code Ann. § 75-1-201. On the other hand, if the Council is a federal agency, *see* 786 F.2d at 1373 (Beezer, J., dissenting), it is subject to federal environmental law requirements. 42 U.S.C. § 4332. This Court has held:

> NEPA's instruction that all federal agencies comply with the impact statement requirement... "to the fullest extent possible," 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle. [T]he Senate and House conferees [stated:]

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[14] This does not, as the Ninth Circuit claimed, involve a state imposing its own law on a compact. 786 F.2d at 1371. Congress, not the states, required compliance with environmental laws when it passed the Act. "The states who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached." *Petty*, 359 U.S. at 281-82. All four states expressly agreed to act pursuant to the Act. Idaho Code § 61-1201 ("Idaho agrees to participate in the formation of the [Council]... created pursuant to the [Act]"); Mont. Code Ann. 90-4-401 ("Montana agrees... to the performance of the functions and duties... as provided in the [Act]"); Or. Rev. Stat. 469.800 ("Oregon agrees to participate in the formation of the [Council] pursuant to the [Act]"); Wash. Rev. Code § 43.52A.030 ("[Washington's Council members] shall undertake the functions and duties of members of the Council as specified in the Act...").

> *"[N]o agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance."* 115 *Cong. Rec.* 39703 (1969) (House conferees).

Flint Ridge Dev. Co. v. Scenic Rivers Asso'n., 426 U.S. 761, 787-88 (1976) (emphasis added). The Ninth Circuit's exemption of the Council from *any* EIS requirement ignores Congress' intent underlying the Act and the general presumption favoring EIS review.

b. The Ninth Circuit's Holding that the Council's Plan Does Not Have a Substantial Environmental Impact Conflicts with Other Circuit Court Tests for Substantial Impact.

The Ninth Circuit also held that the Council's Plan was not a "substantial federal action affecting the human environment." 786 F.2d at 1371. Yet the Plan directs BPA to acquire between 1,000 and 11,000 megawatts of electric energy resources throughout the region. Plan Vol. I, figs. 5-1 to 5-4. The Ninth Circuit's test for substantial impact conflicts with that of other Circuit courts, which require far less impact to mandate preparation of an EIS. *E.g., Sierra Club v. Lynn*, 502 F.2d 43, 57-58 (5th Cir. 1974) *cert. denied*, 421 U.S. 994 (1975) ("HUD's commitment to guaranty 18 million dollars in [housing] bond obligations . . . constituted a major federal action 'significantly affecting the quality of the human environment' "); *WATCH v. Harris*, 603 F.2d 310, 317, 326 (2d Cir. 1979) ("the granting of approval for acquisition or demolition of any property was a 'major federal action . . .' "); *National Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971) (the National Environmental Policy Act "requires the Department of Interior to comply with its provisions having to do with a depletable resource [helium]").[15]

[15] This is not a mere factual discrepancy. The different treatment of impacts of such dramatically different magnitudes renders the approaches of the Ninth Circuit and the other Circuits irreconcilable. They are applying different standards of law.

c. The Ninth Circuit's Holding Erodes Important Environmental Protections.

Environmental laws protect interests of paramount importance to the people of the region and the nation. 42 U.S.C. § 4332; Mont. Rev. Code Ann. 75-1-103; Wash. Rev. Code 43.21C.020. By allowing the Council to disregard EIS requirements under the cloak of an interstate compact, the Ninth Circuit threatens the enforcement of environmental (and other laws) of vital state and federal importance whenever compacts are used. By finding no substantial impact, the Ninth Circuit endangers EIS effectiveness. As few if any actions will have impacts equal to those of the Plan, the Ninth Circuit's test for substantial impact effectively renders EIS requirements non-existent.[16]

3. The Ninth Circuit has Permitted the Council to Eliminate, by "Reasonable Agency Interpretation," a Federal Statutory Requirement That Protects Housing Consumers Against Hundreds of Millions of Dollars in Excess Construction Costs.

The Act requires the Plan to be *both* "cost effective for the region and economically feasible for consumers." 16 U.S.C. § 839b(f)(1) (emphasis added). The Council substituted its own interpretation of the Act's requirement that the MCS be "economically feasible for consumers" in place of the intent Congress expressed in the legislative history. The Ninth Circuit affirmed the Council's interpretation.

"Economically feasible for consumers" is not defined in the Act. To understand the legislative history of the Act, one

[16] The Ninth Circuit's holding could lead other circuits to misinterpret and misapply NEPA, and lead the courts of states with statutes patterned after NEPA to misapply their statutes: "At least 14 states and Puerto Rico have passed little NEPAs." M. Boher, J. Noming & R. Morrison, ENVIRONMENTAL IMPACT STATEMENTS: A GUIDE TO PREPARATION AND REVIEW 35, n.56 (1977 ed.).

must first understand the definition of the other standard an MCS measure must satisfy — "cost-effective for the region." One must also understand the difference between the two standards.

A conservation measure or resource is "cost-effective for the region" only if it produces or saves electricity "at an estimated incremental system cost no greater than that of the least-cost similarly reliable measure or resource, or any combination thereof." 16 U.S.C. § 839a(4)(A). This means a conservation measure is "cost-effective for the region" when it is the cheapest means of meeting increased electric power demand.

The legislative history of the Act establishes that "economically feasible *for consumers*" and "cost-effective for *the region*" are distinct standards with important differences. "Economically feasible for consumers" tests conservation from the consumer's perspective; "cost-effective for the region" tests conservation from the region's perspective. "Economically feasible for consumers" is founded on the concept of "average" cost; "cost-effective for the region" is founded on the concept of "marginal" cost. *See* House Interior Report at 43; 126 *Cong. Rec.* H9853 (daily ed. Sept. 29, 1980) (remarks of Rep. Swift).

When electric rates are set, low cost resources, such as a hydroelectric dam built in 1935, are averaged with high cost resources, such as a coal-fired electric power plant built in 1986. The overall effect on consumers is an electric power rate reflecting the average cost of electricity produced by both the dam and the coal plant. Thus, "economically feasible for consumers" compares the cost of an MCS measure to average cost electric rates.

By contrast, one looks to the marginal cost of a resource to determine if it is "cost effective for the region." *Id.* The marginal cost of electric energy is the cost of producing the last unit of energy. Marginal cost is also known as "avoided cost." Regional marginal cost is the long-run cost of additional consumption to the region due to additional resources being required.

A resource can be "cost-effective for the region," yet fail to be "economically feasible for consumers." For example, assume that the region pays 1¢ per kilowatt hour ("¢/kwh") for 1 megawatt of hydropower, 2¢/kwh for 1 megawatt of conservation, and 3¢/kwh for 1 megawatt of geothermal generated electricity. Also assume the region needs 1 more megawatt, and that the cheapest resource available is a conservation measure costing 4¢/kwh. The 4¢/kwh which the *region* must pay for its last needed megawatt is the *marginal* cost. After it is purchased, *consumers* will pay electric rates of 2.5¢/kwh, which is the *average* cost of all four megawatts. The 4¢/kwh conservation measure would be cost-effective for the region, because it is cheaper than all alternatives. However, the 4¢/kwh conservation measure would not be economically feasible for consumers because, at 4¢/kwh, it is more expensive than the 2.5¢/kwh average cost electricity it would save.

Congress recognized that the marginal cost of electric resources could be greater than the cost of previously-acquired resources. Congress also recognized that, under such circumstances, there would be a gap (like that in the foregoing example) between what is cost-effective for the region and what is economically feasible for consumers. If both standards are to be achieved, consumers must be reimbursed for the amount of that gap. Congress intended that no conservation measure be imposed on consumers unless they were reimbursed for that amount. The final House report stated:

> These standards are to be designed to produce all power savings that are cost effective for the region and economically feasible for consumers through financial assistance made available under this legislation. Consumers will therefore bear the cost of conservation measures that are cost-effective in terms of the electric rates consumers pay, while the cost of the additional increment of conservation that is cost-effective to the region will be met through financial assistance that BPA is required to provide under section 6(a) [16 U.S.C § 839d(a)].

House Interior Report at 43. Congressman Swift explained:

> [T]he standards themselves will be based on marginal cost, and . . . [BPA's] Administrator will make available the financial assistance that will ensure these standards are

> attained. Without this provision, the economically feasible level of the conservation for consumers would be less . . .

126 *Cong. Rec.* H9853 (daily ed. Sept. 29, 1980)

The Council originally conceded that Congress required reimbursement for the amount of any gap as a pre-condition for implementing conservation measures. *See* Council minutes and meeting transcript excerpts reproduced in Appendices U through X. The Council, in its Plan, declined to do what it had admitted it was bound to do. The Plan requires new homes to use all conservation measures costing no more than 4¢/kwh. Plan Vol. I, 10-4. This is the region's *marginal* cost of electricity. *See* Plan Vol. I, 7-1. Hence, when it used the 4¢/kwh marginal cost of electricity to test conservation's economic feasibility for consumers, Plan Vol. IV, 112-114, the Council was in fact applying the test for cost-effectiveness for the region. As explained above, the test for cost-effectiveness for the region is based upon the *marginal* cost of electricity, whereas the test for economic feasibility for consumers is based on the *average* cost of electricity, which is what consumers actually pay.

The Ninth Circuit endorsed this belated departure from congressional intent. The Ninth Circuit stated:

> The Council believes that *marginal* cost is a more accurate measure of energy cost than is *average* cost because of differences in market price for different consumers. *See* Plan Vol. 1 at 4-6. Furthermore, economic efficiency should be based upon avoided cost which is measured by *marginal, not average,* cost.

786 F.2d at 1369 (emphasis added). The Ninth Circuit's and the Council's substitution of a standard based on marginal cost directly contravenes Congress' clearly expressed intent that consumers will bear only the cost of measures "that are cost-effective *in terms of the electric rates consumers will pay.*" House Interior Report at 43 (emphasis added). Even if this method were more reasonable than what Congress intended, the Council (and the Ninth Circuit) must comply with Congressional intent. *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 461 (1985).

To sustain the Council's actions, the Ninth Circuit substituted its own notion of "economic efficiency" for the Act's standard of "economically feasible for consumers." 786 F.2d at 1369. Yet nowhere do the Act or the legislative history discuss "economic efficiency." The Ninth Circuit cites portions of the history that address "cost-effectiveness for the region," not "economic feasibility for consumers." *See* 126 *Cong. Rec.* S14692 (daily ed. Nov. 19, 1980) (remarks of Sen. Jackson) (justifying conservation's 10% cost advantage in the definition of "cost-effective for the region"); House Commerce Report, *supra*, n.1 at 50 (explaining definition of "cost-effective for the region"). The Ninth Circuit also cites the Senate Report that dealt with an earlier draft of the Act, which required conservation only to be "cost effective for consumers." Senate Report at 21. The Ninth Circuit ignored that Congress *later* recognized that such a standard jumbled together two independent concerns, so Congress *substituted* the *two* criteria of "cost effective for the region" and "economically feasible for consumers" for the *single* test, "cost effective for consumers." *Compare id.* at 25 *to* 16 U.S.C. § 839b(f)(1).[17]

By equating its own notion of "economic efficiency" with "economically feasible for consumers," the Ninth Circuit has given "economically feasible for consumers" and "cost-effective for the region" the same meaning. 786 F.2d at 1369. Yet the Act requires the MCS to meet *both* tests. 16 U.S.C. § 839b(f)(1). If "economically feasible for consumers" is to mean anything, it must be different than "cost-effective for the region." No statutory provision should be construed as a redundancy, when it can be given full effect. *E.g., Stephens v. Cherokee Nation*, 174 U.S. 445, 480 (1899).

The Ninth Circuit incorrectly suggested that it may uphold an agency interpretation merely because it is reasonable. 786 F.2d at 1366-67, 1369. It overlooked the rule that when congressional intent is apparent, it must be followed. *United States v. Clark*, 454 U.S. 555, 560 (1982). By contrast, in *Chevron USA, Inc. v. NRDC*, 104 S. Ct. 2778, (1984), this Court deferred to a reasonable agency interpretation *only* after

[17] Although the Petitioners brought this to the court's attention in the petition for rehearing, *see* Pet. at 10-12 (Appendix T), the Ninth Circuit declined even to address it.

concluding that "Congress did not actually have an intent." *Id.* at 2783.[18] Neither the Council nor the Ninth Circuit followed congressional intent.

The failure of the Council and the Ninth Circuit to follow congressional intent has serious consequences for the region and the nation. The MCS are invalid because the Council did not test them by both standards. As a result, the Council and the Ninth Circuit have upset Congress' planned allocation of costs, and consumers of new housing will bear an inordinate burden. While the MCS remain in effect, each of the tens of thousands of consumers who annually buy homes in the region[19] will be forced to pay thousands of dollars for conservation measures,[20] many of which cost more than they save.[21] These costs will badly injure the region's home buyers, housing industry, and economy. They will deprive tens of thousands of families of the chance to own their own

[18] "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable *and* not in conflict with the expressed intent of Congress." *Riverside Bayview Homes, Inc.*, 106 S. Ct. at 461 (emphasis added).

[19] An estimated average of 85,000 new single-family homes and 24,000 multi-family homes will be built in the region each year from 1986 to 2002, when the Plan begins and ends. A total of 1,445,000 new single-family homes and 408,000 new multi-family homes are projected to be built in the region during the life of the Plan.

[20] The standards will be very expensive. For example, the Council estimates that the conservation requirements for space heating alone will add $1,900 to the cost of a single-family home west of the Cascades, and $3,000 east of the Cascades, in 1983 dollars. Plan Vol. II, Tables J6-1a, J6-1b, J6-1c, K-14 and K-15. The standards for space heating conservation will add approximately $197 million to the cost of new single family housing during each year of the Plan, some $3.35 billion during its 17-year course.

[21] The MCS require the region's new homes to include all conservation measures which would cost no more than 4¢/kwh of electricity saved, in 1983 dollars. Plan Vol. I, 10-4. Yet the Council's Own findings establish that, even in the Councils "extremely unlikely" high growth forecast, electric rates will never be higher than 3.6¢/kwh during the life of the Plan and, during most of the life of the Plan, electric rates will be considerably lower. Plan Vol. I, 5-15; Plan Vol. I, 4-3, fig. 4-4.

homes.[22] The resulting decline in the housing industry could seriously damage the region's economy, because housing has traditionally been a major generator of employment and a key to prosperity.[23]

The Ninth Circuit's suggestion that it may uphold an agency interpretation because it is reasonable, when coupled with its misapplication of the legislative history of the Act, sanctions the usurpation of legislative authority by an administrative agency. This is the mirror image of the problem created by Congress' violation of the Appointments Clause. Whereas the manner of the Council's appointment constitutes the usurpation by Congress and the states of authority granted by the Constitution to the federal Executive, the Ninth Circuit, by interpreting "economically feasible for consumers" to give it a meaning contrary to the intent of Congress, has sanctioned the Council's usurpation of congressional authority. It is no more legitimate for an administrative agency (or the judiciary) to encroach upon the authority the Constitution grants to Congress, than it is for Congress or the states to encroach upon the authority the Constitution grants to the federal Executive. This Court should send a clear message to the Council, the circuit courts, the Congress and the states that it will not tolerate either kind of encroachment.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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October 6, 1986

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[22] Every $1,000 in extra cost to a living unit eliminates .9% of the home buyers from the market.

[23] The Council's data show that the region's construction industry as a whole employed 158,000 people in 1980. The Council did not determine how much of that employment was in the housing industry.

APPENDIX A

[1359]SEATTLE MASTER BUILDERS ASSOCIATION; Homebuilders Association of Spokane, Inc.; National Woodwork Manufacturers' Association; Fir & Hemlock Door Association; Shelter Development Corporation; Clair W. Daines, Inc.; Conner Development Company; Donald N. McDonald; Seattle Door Company, Inc.; Homebuilders Association of Washington State,
Petitioners,

v.

PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL
(Northwest Power Planning Council)
Respondent,

and

UNITED STATES OF AMERICA,
Intervenor-Respondent.

No. 83-7585

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Argued and Submitted May 9, 1985.

Decided April 10, 1986.

As Amended June 11, 1986.

[1362] Petition for Review of Final Action by the Northwest Power Planning Council.

Before GOODWIN, SCHROEDER and BEEZER, Circuit Judges.

GOODWIN, Circuit Judge:

A group of home builders and other industry representatives filed an original petition in this court seeking to strike down as unconstitutional both the Pacific Northwest Electric Power and Conservation Planning Council and the Council's 1983 Northwest Conservation and Electric Power Plan.

We have jurisdiction under the Pacific Northwest Electric Power Planning and Conservation Act, Pub L. 96-501, 94 Stat. 2697, 16 U.S.C. § 839 et seq. (1982) (the Act) and we uphold both the constitutionality of the Pacific Northwest Electric Power and Conservation Planning Council, a policy-making body established by that Act, and the validity of the Council's 1983 Northwest Conservation and Electric Power Plan.

Petitioners seek relief against two entities: the first is the United States government, which has intervened on behalf of the Bonneville Power Administration (BPA), an agency of the United States Department of Energy.[1] The second is the Council itself. BPA is statutorily charged with the production, marketing and distribution of electric power in the Pacific Northwest. See Bonneville Project Act, 16 U.S.C. § 832a. See generally BPA, Columbia River Power for the People: A History of Policies of the Bonneville Power Administration (1981). The Council's mandate is to prepare a conservation and electricity usage plan for the region served by

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[1] Amicus briefs have been filed by the States of California, Oregon, Idaho, Montana and Washington, the City of Tacoma, Washington, the National Governors' Association and two public interest organizations.

the BPA and to develop a program for energy planning consistent with regional environmental and ecological concerns. § 839b(a)(1). Congress has consented to the establishment of the Council, § 839b(a), to be composed of the members appointed by the governors of Washington, Oregon, Montana and Idaho. Each state has agreed to participate in the Council, and has enacted legislation which authorizes the governor to appoint two members to the Council. Wash.Rev.Code Ann. § 43.52A.010; (1986); Or.Rev.Stat. § 469.800; (1985); Mont.Code Ann. § 90-4-401 (1985); Idaho Code § 61-1201 (1985).

The Act directs the Council to prepare a regional energy plan which is to provide

> a general scheme for implementing conservation measures and developing resources . . . with due consideration by the Council for (A) environmental quality, (B) compatibility with the existing regional power system, (C) protection, mitigation,

> and enhancement of fish and wildlife . . . and (D) other criteria which may be set forth in the plan.

§ 839b(e)(2). The Council adopted the final 1983 plan in April 1983. 48 Fed.Reg. 24,493 (June 1, 1983).

The Council and BPA operate independently of each other. Their functions directly overlap, however, under those portions of the Act which provide that certain BPA actions will be consistent with the Council's plan, §§ 839b(d)(2), 839b(h), 839c(d)(3), 839d(b), 839d(c); that the Council can request certain action of BPA, §§ 839b(f)(2), 839b(J); and that the Council can review BPA actions, § 839b(i). See Hemmingway, The Northwest Power Planning Council: Its Origins and Future Role, 13 Envtl.L. 673 (1983).

The petition raises several issues. First, it attacks the 1983 plan as arbitrary and capricious under the Act and the Administrative Procedure Act, 5 U.S.C. §

553 (1982). Second, petitioners attack the constitutionality of the Council itself, claiming that because the Council primarily influences federal, not state, government actions it constitutionally cannot be an interstate compact organization. Petitioners' third argument is that the Council violates the appointments clause, U.S. Const. art. [1363] II, § 2, cl. 2, because the Council exercises significant authority over the federal government but has not been appointed by the President.

I. The Council as a Compact Agency

The parties and amici disagree about whether to classify the Council as a federal agency or as an interstate compact organization. See U.S. Const. art I, § 10, cl. 3 ("compact clause"). Those attacking the Council as unconstitutional argue that it is a federal agency, despite the congressional disclaimer that it is

not a federal agency. § 839b(a)(2)(A)-(iv). Those who defend the constitutionality of the Council characterize it as a compact agency, outside the scope of the appointments clause. We hold that it is a compact agency and that its members are not "federal officers" within the meaning of the appointments clause.

Congress' intention is clear from both the language of the statute, § 839b(b), and from the legislative history, that the Council is not to be a federal agency and is not to be controlled by the federal government. 126 Cong.Rec. 30186 (1980) (remarks of Sen. McClure). The alternative establishment of the Council as a federal agency was a rejected second choice. § 839b(b). One of the principal purposes of the Council is to represent state concerns about regional problems; Congress deemed it undesirable for a federal agency to represent state concerns

to yet another federal agency. 126 Cong.Rec. 30181 (1980) (remarks of Sen. McClure) ("The Pacific Northwest does not need and candidly will not suffer lightly a federally imposed regional planning process with apparent input from Washington acting as a federal agency."). See also 126 Cong.Rec. 30181 (1980) (remarks of Sen. Hatfield); 126 Cong.Rec. 29808 (1980) (remarks of Rep. Dingell). Congress wanted to avoid conflicts with state law and to maintain accountability through the application of federal substantive and procedural law, see 126 Cong.Rec. 29808 (1980) (remarks of Rep. Dingell), but also wanted to avoid the potential constitutional problems of a federal agency composed of state appointees. H.R.Rep. No. 96-976 (Part II, 96th Cong., 2d Sess. 40-41 (majority views), 70-71 (supplemental views of Rep. Williams) (1980), U.S. Cong. & Admin.News

(1980) pp. 5989, 6038, 6039, 6063-6065; 126 Cong.Rec. 30186 (1980) (remarks of Sen. McClure).

The Supreme Court recently outlined some of the indicia of compacts. These are establishment of a joint organization for regulatory purposes; conditional consent by member states in which each state is not free to modify or repeal its participation unilaterally; and state enactments which require reciprocal action for their effectiveness. Northeast Bancorp, Inc. v. Board of Gov'rs of the Federal Reserve System, __ U.S. ___, 105 S.Ct. 2545, 2554, 86 L.Ed.2d 112 (1985). Even if all these indicia of compacts are present, the only interstate agreements which fall within the scope of the compact clause are those "tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."

Cuyler v. Adams, 449 U.S. 433, 440, 101 S. Ct. 703, 707, 66 L.Ed.2d 641 (1981). "The relevant inquiry must be one of impact on [the] federal structure." United States Steel Corporation v. Multistate Tax Commission, 434 U.S. 452, 471, 98 S.Ct. 799, 811, 54 L.Ed.2d 682 (1978); see Virginia v. Tennessee, 148 U.S. 503, 13 S.Ct. 728, 37 L.Ed. 537 (1893). If the joint activity does not affect the federal sphere, no approval by Congress is needed. If it affects the federal sphere, then Congress must authorize the activity. Cuyler v. Adams, 449 U.S. at 440, 101 S.Ct. at 707.

The Council satisfies all these indicia. The Council is an operational body established by reciprocal legislation whose effectiveness is conditioned upon binding legislative commitments by the states.

Petitioners and amicus Pacific Legal Foundation argue that certain features of the Council are unusual and that this unusual nature militates in favor of considering the Council to be a federal rather than a compact agency. The two aspects of the [1364] Council that petitioners and amicus claim are unusual are, first, that congressional approval of the Council was accorded before the states agreed to form it, and, second, that the Council's activities directly affect a federal agency.

An unusual feature of a compact does not make it invalid. A leading article by Professors Frankfurter and Landis sets the tone for the modern use of compacts. It encourages new uses. "The combined legislative powers of Congress and of the several States permit a wide range of permutations and combinations for governmental action. . . . Political

energy has been expended on sterile controversy over supposedly exclusive alternatives instead of utilized for fashioning new instruments adapted to new situations." Frankfurter & Landis, The Compact Clause of the Constitution -- A Study in Interstate Adjustments, 34 Yale L.J. 685, 688 (1925).

Moreover, the two features of the Council emphasized by petitioners and amicus are not unusual. Courts have considered both. "Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined." Cuyler, 449 U.S. at 441, 101 S. Ct. at 708. See, e.g., Flood Control Act of 1936, 49 Stat. 1570 (1936) 33 U.S.C. § 701d (1982); Crime Control Consent Act of 1934, 48 Stat. 909 (1934), 4 U.S.C. § 112(a) (1982). Congress also may grant

its consent conditional upon the states' compliance with specified terms. Cuyler, 449 U.S. at 439-40, 101 S.Ct. at 707-08. See James v. Dravo Contracting Co., 302 U.S. 134, 148 58 S.Ct. 208, 215, 82 L.Ed. 155 (1937).

It is also not unusual for the federal government to be involved in or to be directly affected by compact-created agencies. See, e.g., Washington Metropolitan Transit Regulation Compact, 74 Stat. 1031 (1960); Interstate Compact on the Potomac River Basin, 54 Stat. 748 (1940); Ohio River Valley Water Sanitation Compact, 54 Stat. 752 (1940); Upper Colorado River Basin Compact, 63 Stat. 31 (1949). Cf. Washington Metropolitan Area Transit Authority v. One Parcel of Land, 706 F.2d 1312, 1316 (4th Cir.), cert. denied, 464 U.S. 893, 104 S.Ct. 238, 78 L.Ed.2d 229 (1983) (federal goverment

delegates powers to a compact organization). The federal government has even participated as a member of interstate compact agencies. See, e.g., Delaware River Basin Compact, Pub.L. No. 87-328, 75 Stat. 688 (1961).

There is no bar against federal agencies following policies set by non-federal agencies. The federal government has in fact agreed to be bound by state law in several areas. See California v. United States, 438 U.S. 645, 656-57, 98 S.Ct. 2985, 2991-92, 57 L.Ed.2d 1018 (1978) (federal reclamation projects must follow state water laws); Hancock v. Train, 426 U.S. 167, 178-80, 96 S.Ct. 2006, 2012-13, 48 L.Ed.2d 555 (1976) (federal government must comply with state air pollution standards); see also Columbia Basin Land Protection Association v. Schlesinger, 643 F.2d 585, 604-06 (9th Cir. 1981) (federal government must comply

with state environmental standards); California v. EPA, 511 F.2d 963, 968-69 (9th Cir. 1975) (federal agencies must comply with state water pollution standards), rev'd on other grounds, 426 U.S. 200, 211-13, 96 S. Ct. 2022, 2027-29, 48 L.Ed.2d 578 (1976). The federal government can be subject to state law where there is a clear congressional mandate and specific legislation which makes the authorization of state control clear and unambiguous. Hancock, 426 U.S. at 179, 96 S.Ct. at 2012.

II. Appointment of Council Members

Petitioners argue that, even if the Council is a valid compact organization, the appointments clause of the United States Constitution requires that Council members be appointed not by the state governors, § 839b(a)(3), but by the President because the Council exercises significant authority over the federal government. See U.S. Const. art. II, § 2,

cl. 2. The appointments clause is addressed to the separation of [1365] powers between the President and Congress. See Buckley v. Valeo, 424 U.S. 1, 126, 96 S.Ct. 612, 685, 46 L.Ed.2d 659 (1976). No court has yet held that the appointments clause prohibits the creation of an interstate planning council with members appointed by the states.

The Supreeme [sic] Court in Buckley said that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must, therefore, be appointed" by the President. Id. Petitioners claim that appointment of Council members by the state governors violates Buckley.

Petitioners' theory, however, would outlaw virtually all compacts because all or most of them impact federal activities and all or most of them

have members appointed by the participating states. See, e.g., Washington Metropolitan Area Transit Authority, 706 F.2d at 1314.

The appointments clause applies to (1) all executive or administrative officers, 424 U.S. at 123-26, 96 S.Ct. at 684-86; (2) who serve pursuant to federal law, 424 U.S. at 126, 96 S.Ct. at 685; and, (3) who exercise significant authority over federal government actions. 424 U.S. at 126-27 & n. 162, 96 S.Ct. at 685 & n. 162. Unless all three prongs of the Buckley test are met, there is no violation of the appointments clause.

The council members clear the second Buckley element. The Council members do not perform their duties "pursuant to laws of the United States." See Buckley, 424 U.S. at 126, 96 S.Ct. at 685. Rather, the Council members perform their duties pursuant to a compact which requires both

state legislation and congressional approval. Without substantive state legislation, there would be no Council and no Council members to appoint. While congressional consent gives an interstate compact some attributes of federal law, the Council members' appointment, salaries and administrative operations are pursuant to the laws of the four individual states, within parameters set by the Act. §§ 839b(a)(3), 839b(a)(4). More important, the states ultimately empower the Council members to carry out their duties. Federal law provides congressional consent for formation of the Council as it does for the creation of all compacts and compact agencies. Federal law also affects the substance of Council policy decisions because the Act constrains Council policy-making, see §§ 839b(c), (d), (e), and subjects some Council operations to federal law. As with any

compact, congressional consent did not result in the creation but only authorized the creation of the compact organization and the appointment of its officials. The appointment, salaries and direction of the Council members are state-derived.

We need not reach the first and third Buckley elements. The question, thus narrowed, because Council members do not serve pursuant to federal law, makes immaterial whether they exercise some significant executive or administrative authority over federal activity. It is likewise immaterial how their duties are classified: executive or administrative, because they perform these duties under a compact, rather than "federal law" within the meaning of Buckley.

Buckley is about maintaining the separation of powers within the federal government. This concern is not implicated here. In this case, unlike Buckley,

Congress has not arrogated to itself a power that would otherwise be exercised by the President. See also Synar v. United States, 626 F.Supp. 1374 (D.D.C. 1986) (per curiam) which holds the exercise of executive power by an officer who could be removed by Congress unconstitutional. The court in Synar stressed the "founders' often expressed fear 'that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.'" Synar, 626 F.Supp. at 1401, quoting Buckley v. Valeo, 424 U.S. at 129, 96 S.Ct. at 687. Because Congress neither appoints nor removes the members of this Council, the balance of powers between Congress and the President is unaffected. [1366]

The Council violates neither the compact nor appointments clauses of the United States Constitution. The Act establishes an innovative system of

cooperative federalism under which the states, within limits provided in the Act, can represent their shared interests in the maintenance and development of a power supply in the Pacific Northwest and in related environmental concerns.[2]

III. Validity of Council's Plan

Having concluded that the Council is constitutional, we examine the substance of the 1983 plan. In this action petitioners challenge only that portion of the 1983 plan which establishes model energy conservation standards for new residential construction. Consequently, we so limit the following discussion.

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[2] For a thorough analysis and history of the constitutional position of such experiments in cooperative federalism, See Grad, Federal-State Compact: A New Experiment in Co-Operative Federalism, 63 Colum.L.Rev. 825 (1963) (discussing the federal role in the Delaware River Basin Commission).

A. Standard of Review

Congress directed that the Administrative Procedure Act, 5 U.S.C. §§ 701-06, govern our review of Council actions. Adoption of the plan is a final action subject to judicial review for the purposes of the Administrative Procedure Act. 16 U.S.C. § 839f(e)(1)(A); see 5 U.S.C. § 553.

While Congress intended that this court's scope of review of Council actions be consistent with 5 U.S.C. § 706, the Act specifically declines to require that the Council follow the hearing provisions of 5 U.S.C. §§ 554, 556, and 557, which govern formal rulemakings. § 839f(e)(2). Consequently, this court will use neither the substantial evidence standard, 5 U.S.C. § 706(2)(E), nor the de novo standard, 5 U.S.C. § 706(2)(F). The remaining subsection of 5 U.S.C. § 706 provides that an agency's factual findings

may be set aside if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). We adopt this standard of review.

Although this court generally reviews legal questions de novo, United States v. McConney, 738 F.2d 1195, 1201 (9th Cir.), cert denied, __ U.S. ___, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984), amici have urged that we review the Council's interpretations of the Act under a more deferential standard. Amici argue the general rule that where a statutory interpretation is "a contemporary construction of a statute by [those] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly, while they are yet untried and new," a court should review a statutory construction deferentially. Amer. Paper Inst., Inc. v. Amer. Elec. Power Service

Corp., 461 U.S. 402, 422, 103 S.Ct. 1921, 1932, 76 L.Ed.2d 22 (1983), quoting Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). Under this deferential review, a court examines only the reasonableness of the interpretation, and "need not find that [the agency's] construction [of its enabling act] is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Amer. Paper Inst., 461 U.S. at 422-23, 103 S.Ct. at 1932-33; quoting Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136 (1946). See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

The Supreme Court has deferred to BPA interpretations of the Act. ALCOA v. Central Lincoln Peoples' Util. Dist., 467

U.S. 380, 104 S.Ct. 2472, 2479-80, 81 L.Ed.2d 301 (1984). This court has done likewise. See Department of Water and Power v. BPA, 759 F.2d 684, 690-91 (9th Cir. 1985); Central Lincoln Peoples' Util. Dist. v. Johnson, 673 F.2d 1076, 1078, as amended, 686 F.2d 708, 710-11 (9th Cir. 1982), rev'd on other grounds, 467 U.S. 380, 104 S.Ct. 2472, 81 L.Ed.2d 301 (1984); Columbia Basin Land Protection Ass'n, [1367] 643 F.2d at 599-600 (and cases cited therein).

The preparation and consideration of the plan is a matter within Council authority over which the Act accords the Council considerable flexibility. For the same reasons that we defer to BPA expertise in construing other sections of the Act, therefore, we will defer to the Council's interpretations of § 839b if reasonable.

B. Model Conservation Standards

The Act requires that the Council's plan afford priority to certain resources:

> The plan shall . . . give priority to resources which the Council determines to be cost-effective. Priority shall be given: first, to conservation; second, to renewable resources; third, to generating resources utilizing waste heat or generating resources of high fuel conversion efficiency; and fourth, to all other resources.

§ 839b(e)(1).

The Act further requires that the plan include model conservation standards, § 839b(f)(1), § 839b(e)(3)(A). The Council is directed to adopt model conservation standards applicable to new and existing structures which reflect "geographic and climatic differences within the region" and which "produce all power savings that are cost-effective for the region and economically feasible for

consumers."[3] § 839b(f)(1) (emphasis added). The Act defines "cost effective" resources as those which are forecast "to be reliable and available . . . to meet or reduce the electric power demand . . . of the consumers . . . at an estimated incremental system cost no greater than that of the least-cost similarly reliable and available alternative measure or resource, or combination thereof." § 839a(4)(A). The Act defines the term "system cost" as an "estimate of all direct costs of a measure or resource over its effective life including [direct and

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[3] The model conservation standards incorporated in the 1983 plan specify an energy performance budget for space heating. The energy performance budget does not require any particular building practice or components but instead mandates minimum overall energy efficiency and specifies several different approaches which builders can use to satisfy the performance standards. The energy budget is divided into three climatic regions depending upon the number of heating or cooling degree-days in the region.

quantifiable environmental costs and benefits]." § 839a(4)(B). Because the term "economically feasible" is not defined in the Act, the Council's definition is a major point of contention in this action.

Rather than making a single forecast of the need for energy resources, the plan makes four separate, 20-year forecasts of electricity demand, each with separate resource needs. Under the lowest-growth forecast, conservation is the only new energy resource needed to satisfy regional energy demand.[4] Plan Vol. 1 at 5-2 (figure 5-1). Under the

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[4] The Act treats conservation as an energy resource just as any other energy resource. Conservation is unusual, however, because it is not constructed by a utility with predictable costs and output. Determining the value of conservation as an energy resource is one of the complex theoretical problems which the plan confronts.

medium-low, medium-high and high-growth forecasts, demand is satisfied by a mixture of conservation, hydro-electric, cogeneration, coal and combustion turbine energy sources in accord with statutory priorities. Id. (figures 5-2, 5-3, 5-4).

The Council has predicted the probability that each of these growth forecasts will be realized. It has predicted that it is "very unlikely" that growth will be slower than the low-growth forecast or faster than the high-growth forecast. The plan predicts a 33 per cent chance that growth will be more than the low forecast but less than the medium-low forecast; a 45 per cent chance of growth falling between the medium-low and medium-high forecasts; and a 22 per cent chance that growth will exceed the medium-high forecast but be less than the high forecast.

Plan Vol. 1 at 5-17 (and figures 5-13, 5-14).

The 1983 plan predicts that the last resource to be acquired under the high [1368]-growth forecast will be a coal generating plant capable of producing electricity at a cost of slightly over four cents per kilowatt hour (4¢/kwh). The plan considers that conservation measures which "could displace this coal plant would be considered cost-effective." Plan Vol. 1 at 7-1. It defines as cost effective, therefore, any conservation measure with a marginal cost less than 4¢/kwh in current dollars. Id.

The Council concluded that its conservation standards are both cost effective for the region and economically feasible for consumers under § 839b(f)(1) and recommended that BPA impose a surcharge for nonconforming electricity usage beginning January 1, 1986 as authorized by

§ 839b(f)(2). Plan Vol. 1 at 1-3, 11, Vol. 2 Appendix J at Preface 4.

Petitioners argue that it is unreasonable for the Council to interpret cost effectiveness based upon a forecast which the Council itself concedes is "very unlikely." Petitioners argue that the Council cannot adopt a cutoff for cost effectiveness unless it is "more likely than not" that the predictions upon which it is based will be realized. See Industrial Union Department v. American Petroleum Inst., 448 U.S. 607, 653, 100 S.Ct. 2844, 2869, 65 L.Ed.2d 1010 (1980) (OSHA must show that it is more likely than not that health hazard would exist but for its regulations); Bunker Hill Co. v. EPA, 572 F.2d 1286, 1301 (9th Cir. 1977) (EPA cannot establish standards which demand technology which is experimental or only theoretically feasible).

Plan Vol. 1 at 5-17 (and figures 5-13, 5-14).

The 1983 plan predicts that the last resource to be acquired under the high-growth forecast will be a coal generating plant capable of producing electricity at a cost of slightly over four cents per kilowatt hour (4¢/kwh). The plan considers that conservation measures which "could displace this coal plant would be considered cost-effective." Plan Vol. 1 at 7-1. It defines as cost effective, therefore, any conservation measure with a marginal cost less than 4¢/kwh in current dollars. Id.

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forecast or the 4¢/kwh cutoff to be unreasonable in light of the inherent indefiniteness of long-term energy forecasting.

The Act requires the plan to define cost effectiveness in terms of "incremental system cost," which the Council has interpreted to be an estimate of all direct and environmental costs of all the measures required by the conservation standards as a whole. See § 839a(4)(B). Consequently, the Council's measure of cost effectiveness is based on the average cost of a package of conservation measures, none of which has a marginal cost exceeding 4¢/kwh. Although it selected 4¢/kwh as the outer limit for cost effective conservation components, the Council estimates that the average system cost of its conservation standards is only 1.8¢/kwh, Plan Vol. 1 at 10-4, considerably less than the cost of other energy

resources. See Plan Vol. 1 at 4-3, 4-6 (figure 4-4, table 4-3).

Petitioners allege that this interpretation of cost effectiveness is contrary to the Act. They contend that the plan must examine the cost effectiveness of each individual conservation measure because the Act uses the singular in referring to cost effectiveness of "any measure or resource." § 839a(4)(A). The Council's approach is correct. The Act does not require that each individual component of the model conservation standards be cost effective. The purpose of the conservation standards is to require the Council to examine cost effectiveness of standards which, when adopted in their entirety, result in cost effective energy savings. All that is required is that the model conservation standards be cost effective, when viewed as a whole. See § 839b(f)(1).

Petitioners also allege that the Council's definition of cost effectiveness is unreasonable because the 1983 plan does [1369] not adequately consider potential conservation in the government, commercial and industrial sectors. The plan does include operational conservation programs applicable to government, Plan Vol. 1 at 10-17, 10-18, commerce, Plan Vol. 1 at 10-14, 10-15, and industry, Plan Vol. 1 at 10-15, 10-16, and sets conservation requirements for all sectors. Plan Vol. 1 at 7-7 - 7-12, 10-12 - 10-17; see Plan Vol. II Appendix J. The model energy conservation standards for new buildings apply equally to residential and nonresidential structures. See Plan Vol. II Appendix J. Whether the plan provides similar or dissimilar conservation standards for different sectors is a matter within Council discretion under the Act. See § 839a(4)(A), 839b(f)(1). We find the

Council's interpretation of the term "cost effective" to be reasonable.

In addition to requiring cost effectiveness for the region as a whole, the Act requires the model conservation standards to be economically feasible for consumers. § 839b(f)(1). The Act does not define the term but the plan contains a functional definition:

> Although a house built to the Council's model standard will have a slightly higher initial cost, over the life of the house the consumer will be economically better off than if living in a house built to current codes.

Plan Vol. I at 7-3.

In measuring economic feasibility, the plan considers the cost and efficiency of the conservation standards as a whole. Petitioners argue that economic efficiency, like cost effectiveness, should properly be measured on a component-by-component basis. Petitioners assert that a particular conservation component is

economically feasible only if that particular component pays for itself: each individual component must save the homeowner more in electricity than it adds to the cost of the house. Instead of reflecting the marginal (or avoided) cost of energy resources, the petitioners insist, economic efficiency should be a function of the average market cost for electricity, which is not predicted to exceed 3.6¢/kwh. Plan Vol. 1 at 4-6 (table 4-3). Because the plan relies on marginal cost to measure economic efficiency, petitioners argue, the standards for economic feasibility are only theoretically feasible and therefore unreasonable. See Bunker Hill, 572 F.2d at 1301.

The Council believes that marginal cost is a more accurate measure of energy cost than is average cost because of differences in market price for different consumers. See Plan Vol. 1 at 4-6.

Furthermore, economic efficiency should be based upon avoided cost which is measured by marginal, not average, cost. See 126 Cong.Rec. 30181 (1980) (report of the Office of Technology Assessment). Cf. H.R.Rep. No. 96-976 (Part I), 96th Cong., 2d Sess. 50 (1980), U.S. Code Cong. & Admin.News 1980 p. 5989 ("cost comparison is done on the basis of incremental, or marginal, costs").

The plan's definition is consistent with congressional intent. See S.Rep. No. 96-272, 96th Cong., 1st Sess. 25 (1979) (the cost to consumers must be such that "the cost of complying with the standards . . . should not exceed, for the individual or entity to which the standards apply, the direct financial savings produced by compliance"). Petitoners have not shown the Council's definition of economic feasibility to be unreasonable.

Finally, the conservation standards cannot be economically feasible for owners of rental housing, petitioners argue, because the market will not support additional rents necessary to compensate for an increase in construction costs. Not only have petitioners not presented any support for their assertion, but the Council notes that homes which meet the conservation standards may command higher rents because of the savings tenants can enjoy in energy costs. Petitioners have not provided us with sufficient evidence upon which to disturb the Council's conclusion that the standards are economically feasible for owners of rental housing. Application of the model standards to rental housing is not arbitrary or capricious. [1370]

C. Methodology for determining conservation value

Petitioners challenge the technical, analytic process by which the Council arrived at its model conservation standards. The dispute centers on whether it was acceptable for the Council to arrive at its standards using industry engineering standards and computer simulations of energy usage, conservation and efficiency of various conservation measures.

Petitioners argue that the Council's failure to conduct component field testing to determine the value of various conservation measures was an abuse of discretion, and that such component testing is statutorily mandated. See, e.g. §§ 839a(4)(A), 839b(f)(1). They assert that component testing was feasible, would have yielded valuable data and could have been done in the two-year period the Act allows for preparation of the 1983 plan. See § 839b(d).

The Act does not, however, mandate any particular method of forecasting under either the definition of cost effectiveness, § 839a(4)(A), or the section requiring the preparation of model conservation standards, § 839b(f)(1). The Council is given the discretion under the statute to develop a forecast which provides model conservation standards that are cost effective, economically efficient and reflect regional geographic and climatic differences. § 839b(f)(1). See S.Rep. No. 96-272, 96th Cong., 1st Sess. 2 (1979) (value of conservation is to be determined "on the basis of a methodology developed by the Council as part of the plan"). As we have concluded above, the Council's use of four, 24-year forecasts was reasonable in light of its statutory mandate.

To test the value of particular conservation measures, the Council used a computer simulation model, Plan Vol. 1 at

10-4, Glossary-3, combined with standardized coefficients for building materials, components and assemblies. See generally Plan Vol. II Appendix K. The choice of methodology is a highly technical question which falls within the unique expertise of the Council. Unless an abuse of discretion is demonstrated, this court will not substitute its judgment on particular testing methodology. See Department of Water & Power v. BPA, 759 F.2d at 691 (and cases cited therein). While petitioners may be correct in asserting that the Council could have done component testing in lieu of simulations, the Act does not require the Council to do so. The methodology used in the 1983 plan employed accepted industry standards and principles of analysis. See American Society of Heating, Refrigerating and Air Conditioning Engineers, Inc., Ashrae Handbook 1981 Fundamentals (1981). We express no

opinion on the methodology and definitions proposed by the petitioners. Petitioners have not presented evidence before this court to raise serious doubt about the accuracy or reliability of the Council's computer simulation program or the Handbook of Fundamentals, upon which the Council relied. We conclude that the Council did not abuse its discretion when it chose to rely upon industry standards and computer simulations in its calculations of the value of various conservation components.

In our evaluation of the validity of the Council's technical methodology and of the conservation standards, two factors are crucial. First is the technical nature of the Council's decisions which even Congress recognized should be the result of technical, scientific choices. See §§ 839b(c)(11)-(13), 839b(g). Second is the deferential standard for our review

of the Council's action which we have already recognized above. The Council's interpretations of the Act are reasonable and its model conservation standards are not arbitrary or capricious. See Chevron, U.S.A., 104 S. Ct. at 2782-83 (and cases cited therein); see generally 5 K.C. Davis, Administrative Law Treatise § 29.20 (2d ed. 1984).

IV. Application of State Environmental Laws

Petitioners claim that the 1983 plan violates state environmental protection laws [1371] because the Council did not prepare an environmental impact assessment on the model conservation standards. See Wash.Rev.Code Ann. §§ 43.21C.010, 43.21C.030 (Washington environmental protection statute); Mont.Code Ann. §§ 75-1-101, 75-1-201 (Montana Environmental Policy Act).

To the extent that the Council functions as a compact, it is considered

the state-created agency of each state. Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1358 (9th Cir. 1977), Aff'd, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979). A state can impose state law on a compact organization only if the compact specifically reserves its right to do so. See People v. City of South Lake Tahoe, 466 F.Supp. 527, 537 (E.D.Cal. 1978) (compact specifically reserved the right to impose regulations which were more stringent than those imposed by the compact organization itself). Neither Washington nor Montana reserved such rights in their statutes agreeing to establishment of the Council. See Wash.Rev.Code § 43.52A.010; Mont.Code Ann § 90-4-401.

We need not decide whether or to what extent federal environmental laws, e.g. 42 U.S.C. § 4321 et seq., would apply. Neither BPA nor the Council has

taken a substantial federal action affecting the human environment which might trigger application of federal environmental laws. See 42 U.S.C. § 4332-(C)(ii).

PETITION DENIED.

BEEZER, Circuit Judge, dissenting:

This case raises a novel issue under the Appointments Clause of the United States Constitution. We must consider whether Congress may delegate certain federal authority to a body, acting through state-appointed officers, or whether such responsibilities must be reserved to a properly constituted federal agency acting through constitutionally appointed executive officials.

At issue is the constitutionality of the method of selecting the members of the Pacific Northwest Electric Power and Conservation Planning Council. Because I conclude that the method of selecting the

members of the Council violates the Appointments Clause, I respectfully dissent.

I

Background

In 1937, Congress created the Bonneville Power Administration ("BPA"), a federal agency charged with the production, marketing, and distribution of electric power in the Pacific Northwest. In 1980, Congress created the Pacific Northwest Electric Power and Conservation Planning Council ("Council"), which is responsible for promulgating a regional conservation and electric power plan. Pacific Northwest Electric Power Planning and Conservation Act ("the Planning Act"), 16 U.S.C. §§ 839-839h. The Council is composed of members appointed by the governors of Idaho, Montana, Oregon, and Washington. Id. §839b(a)(2)(B). Each state has passed implementing legislation.

Idaho Code §§ 61-1201 to -1207; Mont.Code Ann. §§ 90-4-401 to -404; Or.Rev.Stat. § 469.800-.845; Wash.Rev.Code §§ 43.52A.010-.050.

The Council adopted a plan on June 1, 1983. 48 Fed.Reg. 24,493 (1983). Pursuant to 16 U.S.C. § 839f(e)(1)(A), the Seattle Master Builders Association and several other business organizations filed a petition for review in this court. The United States of America intervened on behalf of the Council.

II

The Applicability of the Appointments Clause

The petitioners argue that the members of the Council must be selected in accordance with the Appointments Clause, which states:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme

> Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established [1372] by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2 (emphasis added). The Council argues that the Appointments Clause is inapplicable because the Council is an interstate compact agency. As a result, two threshold issues must be addressed: (1) whether the Council is an interstate compact agency, and (2) whether the Appointments Clause applies to the members of interstate compact agencies.

A. The Existence of an Interstate Compact

Over half a century ago, Felix Frankfurter and James Landis argued that interstate compacts could provide an effective means for allowing coordinated federal-state control of electric power.

Frankfurter & Landis, The Compact Clause of the Constitution -- A Study in Interstate Adjustments, 34 Yale L.J. 685, 717 (1925). The Council, joined by the four Pacific Northwest states and the National Governors' Association as amici curiae, argues that the Planning Act created an interstate compact. The petitioners, joined by the Pacific Legal Foundation as amicus curiae, argue that the Council is a federal agency.

In form, the creation of the Council resembles the creation of an interstate compact. After listing the purposes of the Council, the Planning Act states: "To achieve such purposes and facilitate cooperation among the States of Idaho, Montana, Oregon, and Washington, and with the Bonneville Power Administration, the consent of Congress is given for an agreement described in this paragraph and not in conflict with this chapter. . . ."

16 U.S.C. § 839b(a)(2). The Planning Act also states that the appointment of members by three states "shall constitute an agreement by the States establishing the Council and such agreement is hereby consented to by the Congress." Id.

On the other hand, the Council lacks several of the classic indicia of an interstate compact. For example, the Supreme Court recently noted that two reciprocal state statutes were unlike an interstate compact because "[n]either statute is conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally." Northeast Bancorp, Inc. v. Board of Govrnors, __ U.S. ___, 105 S.Ct. 2545, 2554, 86 L.Ed.2d 112 (1985). None of the Pacific Northwest states conditioned their agreement to participate in the Council on action by the other states. All four

states are free to repeal their statutes unilaterally.

More significantly, the Planning Act authorized the creation of the Council on the consent of only three of the four states. 16 U.S.C. § 839b(a)(2). The Planning Act does not, however, limit the geographical scope of the Council's responsibilities in such a case. Suppose, for example, that Idaho, Montana, and Oregon had joined the Council, but that Washington had declined to join. The Council, composed of members from Idaho, Montana, and Oregon, would have been responsible for preparing a plan for all four states. In that case, the Council would have taken action that could have substantive effects in a nonmember state.[1] If the Council is truly an

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[1] The substantive effects of Council action are discussed below.

interstate compact agency, that result would not be possible.

In fact, the "region" serviced by the BPA includes portions of Nevada, Utah, Wyoming, and California. 16 U.S.C. §§ 839a(14)(A) & (B). To the extent the Council has authority over BPA actions, the Council also exercises authority affecting electric utility consumers living outside the four states from which the Council members were appointed. The four states involved have therefore agreed to participate in establishing policy and standards, not for each other, but for a federal agency with regional authority extending beyond those states. This is strong evidence that Congress did not intend the establishment of an interstate compact. [1373]

Finally, the Council lacks the most important indicia of an interstate compact agency: a state purpose. While it is

apparent that the Pacific Northwest states have a strong interest in obtaining representation in regional policy making by the BPA, the purpose of the Council is not representative in nature. Instead, the purpose of the Council is to guide the actins of the BPA. Because the states have no right to exercise control over the BPA, that is not a state purpose. If the Council was responsible for coordinating energy and conservation planning at the state level, it would have a state purpose. See Frankfurter & Landis, supra, at 717 (proposing "[c]oordinated [electric power] regulation among groups of States, in harmony with Federal administration over developments on navigable streams and in the public domain"). The Council has no such responsibility.

It is true that interstate compacts by their very nature have federal law implications and provide a vehicle for

states to act in a manner in which a state may not act without congressional consent, thus altering a state's sphere of authority. See L. Tribe, American Constitutional Law § 6-31, at 402 (1978). Congressional consent does "transform an interstate compact . . . into a law of the United States," Cuyler v. Adams, 449 U.S. 433, 438, 101 S.Ct. 703, 707, 66 L.Ed.2d 641 (1981), in that federal judicial interpretation of a compact under the Supremacy Clause controls over a state's application of its own law. See West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 33, 71 S.Ct. 557, 563, 95 L.Ed.2d 713 (1951) (Reed, J., concurring). However, granting a body of state-appointed officials the power to constrain the actions of a federal executive agency is quite another thing. That is not a legitimate function of an interstate compact agency.

While it is difficult to characterize the Council as an interstate compact agency, it is easy to characterize the Council as a federal agency. The classic definition of an "agency" is a "a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking." 1 K. Davis, Administrative Law Treatise § 1.01, at 1 (1st ed. 1958); see id. § 1.02 (2d ed. 1978). The Council is a "governmental authority," and its plan constitutes "rulemaking." See 16 U.S.C. § 839b(a)(4) (stating that the Council is subject to the same general administrative rules as the BPA and the Federal Energy Regulatory Commission). As this case demonstrates, the Council's plan "affects the rights of private parties." The Council is thus an agency. Because the Council has a federal purpose and receives

its authority from federal law, the Council is a federal agency.

In sum, the Council is not an ordinary interstate compact agency. At best, the Council can be characterized as a federal agency created through the interstate compact process. At worst, the Council is a federal agency with its members appointed by state governors. Under either approach, the Council is not exempt from the requirements of the Appointments Clause.

B. The Applicability of the Appointments Clause to Interstate Compacts

The Council argues that interstate compacts are exempt from the Appointments Clause. Assuming for present purposes that the Council can be treated as an interstate compact agency, this argument raises a single issue: whether persons who would ordinarily be regarded as "Officers of the United States" for purposes of the Appointment Clause need

not be appointed in accordance with that provision when their authority is based on an interstate compact. A careful review of the relevant constitutional provisions reveals that the members of interstate compact agencies are not exempt from the Appointments Clause.

Initially, it should be noted that the Appointments Clause is a grant of power to the executive branch. The President has the power to nominate federal officers and, with the advice and consent of the Senate, [1374] to appoint them.[2] See Buckley v. Valeo, 424 U.S. 1, 131, 96 S.Ct. 612, 688, 46 L.Ed.2d 659 (1976) (per curiam); L. Tribe, American

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[2] Concurrent with and derived from this power of appointment, the Constitution "implicitly confers upon the President power to remove civil officers whom he appoints, at least those who exercise executive powers." Synar v. United States, 626 F.Supp. 1374, 1395 (D.D.C. 1986) (declaring automatic deficit reduction provisions of the Balanced Budget and Emergency Deficit Control Act of 1985 unconstitutional as vesting executive

Constitutional Law § 4-8 (1978). In the absence of specific constitutional authority, Congress may not usurp the President's power to nominate federal officers. See Buckley, 424 U.S. at 135, 96 S.Ct. at 689 (holding that the Necessary and Proper Clause, U.S. Const. art. II, § 8, cl. 18, does not authorize congressional abbrogation of the Appointments Clause); L. Tribe, supra, § 4-8, at 184-85 (noting that the Appointments Clause "seeks to

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power to prescribe federal budget reductions in the Comptroller General, an officer removable by Congress); see also Myers v. United States, 272 U.S. 52, 119, 47 S.Ct. 21, 26, 71 L.Ed. 160 (1926) (upholding as incident to power of appointment, the President's plenary power to dismiss a postmaster despite statutory requirement of advice and consent by the Senate).

As with the appointment power, the authority to remove officers exercising executive authority serves the constitutional principle of separation of powers by preserving the President's control over executive governmental functions. It is thus significant that the members of the Council not only are not subject to appointment by the Presient, but also are not made subject to removal by him.

preserve an executive check upon legislative authority").

Congressional authority would be enhanced at the expense of the executive if Congress had the unrestricted power to confer the appointment authority on third parties. To the extent that a governor can appoint a member of an interstate compact agency who would otherwise be subject to the Appointments Clause, the power of the executive branch is diminished.[3]

The Compacts Clause, on the other hand, is not a grant of power either

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[3] Indeed, the Framers expressly rejected the idea that the Appointments Clause is not violated so long as Congress does not arrogate to itself the power to appoint or remove federal officers. The Constitutional Convention voted down a proposed amendment to the Appointments Clause that would have permitted the Congress to delegate appointment power to state governors. 2 M. Farrand, The Records of the Federal Convention of 1787, 406, 418-19 (rev. ed. 1966).

to the states or to Congress. On the contrary, it is a prohibition: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State. . . ." U.S. Const. art. I, § 10, cl. 3. The Compacts Clause does not give Congress the power to create interstate compacts. Similarly, the Compacts Clause does not expressly authorize states to enter into compacts. Instead, the Compacts Clause is a prohibition with an exception. Cf. U.S. Const. amend X ("The powers not . . . prohibited by [the Constitution] to the States are reserved to the States respectively . . . ."). Indeed, most of the cases that have analyzed the Compacts Clause have involved unauthorized interstate compacts. E.g., Northeast Bancorp, 105 S.Ct. at 2554-55.

In light of the lanuguage of the two clauses, it is apparent that the Compacts

Clause is not an exception to the Appointments Clause. The executive branch has the unqualified right to nominate all federal officers. Congress lacks the constitutional authority to delegate that power to the states. Moreover, the Supremacy Clause prevents the states from usurping the executive branch's power. U.S. Const. art VI, cl. 2. Accordingly, the Council's alleged status as an interstate compact agency does not exempt it from scrutiny under the Appointments Clause.

III

The Constitutionality of the Council

It is next necessary to determine whether the method of selecting Council members is constitutional under the Appointments Clause. In light of the Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam), it is

apparent that the relevant provisions of the Planning Act are unconstitutional. [1375]

A. The Constitutional Status of Council Members

1. The Appropriate Legal Standard

The Council argues that the Appointments Clause applies only to employees of the federal government. In essence, the Council is arguing that the applicability of the Appointments Clause is determined by the status of the officer; rather than by the officer's power and authority. In Buckley, the Supreme Court specifically rejected that approach and instead emphasized substance over form:

> The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing "Officers of the United States" but the drafters had a less frivolous purpose in mind . . . .
>
> We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in United States v Germaine, [99 U.S. (9 Otto) 508, 25 L.Ed. 482 (1878)],

> is a term intended to have substantial meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2 of that Article.

424 U.S. at 125-126, 96 S.Ct. at 685. Accordingly, the issue is whether Council members exercise "significant authority pursuant to the laws of the United States."[4]

2. Significant Authority Pursuant to Federal Law

The Council does not argue that it lacks significant authority pursuant to Federal law. Indeed, the United States

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[4] The Council argues that the Buckley test is inapplicable because this case does not present a separation of powers issue. It is apparent, however, that this case raises a separation of powers issue to the extent that Congress and the states are usurping the President's power to nominate federal officers. This case also raises a separation of powers issue to the extent that a "state" entity is exercising authority over exclusively federal functions. In any event, the Council's argument lacks a basis in the text of the Appointments Clause.

government concedes that several provisions of the Planning Act may give the Council "significant" authority pursuant to federal law. An examination of the Planning Act reveals that the Council is not an advisory planning council. Instead, the Council's plan had substantive effects. By issuing the plan, the Council exercised significant authority under federal law.

Initially, the Planning Act requires the BPA to act in a manner consistent with the plan. Section 839b(d)(2) states: "Following adoption of the plan and any amendment thereto, all actions of the Administrator [of the BPA] pursuant to section 839d of this title ["Conservation and resource acquisition"] shall be consistent with the plan and any amendment thereto, except as otherwise specifically provided in this chapter." 16 U.S.C. § 839b(d)(2). The Administrator is em-

powered to determine whether a resource acquisition or conservation decision is consistent with the plan. Id. § 839d(a)(1), (b)(1). As a result, section 839b(d)(2) does not give the Council the power to control the BPA. The issue, however is not whether the Council can control the BPA, but whether the Council exercises significant authority pursuant to federal law. The ability to issue a plan with which the BPA must act consistently constitutes significant authority pursuant to federal law.

The Council's authority, however, extends beyond the ability to promulgate the plan. Under section 839b(i), the Council is authorized to review the BPA's actions "to determine whether such actions are consistent with the plan . . . [and] the extent to which the plan . . . is being implemented." Id. § 839b(i). Under section 839b(j), the Council can

request the Administrator to take action. Id. § 839b(j)(1). The Administrator must respond in writing within ninety days. Id. § 839b(j)(2). If the Administrator refuses to take the requested action, the Council can request an informal hearing and a final, reviewable decision. Id. § 839b(j)(3). While it is true that the Council cannot force the BPA to take action consistent with the plan, this mechanism allows the Council to exert pressure on the [1376] BPA. It also allows the Council to obtain judicial review of the BPA's inaction.

In addition, the Council has the power to block major resource acquisitions or conservation measures that are inconsistent with the plan. Within sixty days after the Administrator's decision, the Council may determine by a majority vote that the proposed acquisition or measure is inconsistent with the plan. Id. §

839d(c)(2)(A); see also id. § 839d(c)(2)(B) (stating that the Council may declare a proposed major acquisition or measure inconsistent with the criteria for developing a plan if no plan is in effect). Section 839d(c)(3) states:

> The Administrator may not implement any [major resource acquisition or conservation measure] that is determined . . . by . . . the Council to be inconsistent with the plan . . .
>
> (A) unless the Administrator finds that, notwithstanding such inconsistency, such resource is needed to meet the Administrator's obligations under this chapter, and
>
> (B) until the expenditure of funds for that purpose has been specifically authorized by Act of Congress enacted after December 5, 1980.

Id. § 839d(c)(3) (emphasis added). Under that provision, the Council has authority to block a major resource acquisition or conservation measure unless the BPA can persuade Congress to overrule the Council.

Section 839c(d) gives the Council similar authority. The Planning Act

establishes a limitation on the amount of electric power that the BPA can sell to direct service industrial customers. Id. § 839c(d)(1). If the BPA seeks to exceed that limitation, Council approval is required. Id. § 839c(d)(3).

Finally, the Planning Act allows the Council to recommend the imposition of a surcharge on the electric rates of customers in areas that have not enacted adequate conservation programs. Id. § 839b(f)(2). In the absence of such a recommendation, the BPA lacks authority to impose such a surcharge.

In sum, the Planning Act gives the Council the ability to produce significant substantive effects. As a result, the members of the Council are "Officers of the United States." Because the President did not appoint the members of the Council, the Council's actions are contrary to the Constitution and therefore void.

3. Other State Officials

The Council argues that invalidation of the Council under the Appointments Clause would mean that various other state officials must be appointed by the President. This argument overlooks the peculiar nature of the Council. On examination, each of the classes of state officials suggested by the Council lacks the characteristics that make the Council subject to the Appointments Clause.

The first class is composed of state officials who spend federal funds. The Council's brief states that "the provision of conditional federal grants for elementary education, for example, does not bring the appointment of school boards and principals under the supervision of the President; yet these state officials establish plans that govern the manner in which federal money may be spent." While the Council is correct, this class of

officials can be distinquished from the Council in three ways. First, these officials do not exercise significant authority under federal law. They do not decide whether funds will be granted or the size of the grant. Second, these officials do not exercise control over the actions of federal officials. Third, these state officials have no authority at all until the funds are received by the state. At that point, the funds are, in effect, state funds.

The second class is composed of state judges. As the Council notes, state judges can decide federal issues. A state judge's authority, however, derives solely from state law. If a state chooses to create courts of general jurisdiction, those courts cannot refuse to decide federal issues. See C. Wright, The Law of Federal Courts § 45 (4th ed. 1983). The Supremacy Clause [1377] requires state

judges to obey federal law, but does not allow those judges to change or to create federal law.

The third class is composed of state legislators. To the extent that state statutes do not discriminate against federal entities or interfere with federal activites [sic], federal agencies are subject to those statutes. See Hancock v. Train, 426 U.S. 167, 179-80, 96 S.Ct. 2006, 2012-13, 48 L.Ed.2d 555 (1976); United States v. Texas, 695 F.2d 136, 138 n. 6 (5th Cir.), cert. denied, 464 U.S. 933, 104 S.Ct. 336, 78 L.Ed.2d 305 (1983). In some cases, Congress specifies that federal entities must obey state laws that would otherwise be preempted. See California v. United States, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978). In those cases, Congress has merely narrowed the scope of federal preemption. The state legislatures are not authorized to

pass legislation solely for the purpose of regulating federal agencies.

The final class is composed of the members of ordinary interstate compact agencies. A compact operates as federal law in the sense that construction of the compact's terms presents a federal question and that state law is not a defense to noncompliance with the compact's terms. See L. Tribe, supra, § 6-31, at 402. The Council, however, is not an ordinary compact. The Council was not created for a state purpose. If, for example, the Council had the power to coordinate energy planning at the state level, it would be valid to that extent. Likewise, Congress perhaps could delegate authority over regional energy production and distribution to an interstate compact agreed to by the states in that region, but Congress may not retain that authority in a federal executive agency (BPA) and create or

approve a state-appointed body (the Council) that may subject that executive agency, at least in part, to its control. Unlike ordinary compacts, the Council can produce substantive effects under federal law. Because the Council's actions are at least partially binding on the BPA, the members of the Council must be appointed in accordance with the Appointments Clause.

B. Innovative Cooperative Federalism

The Council, along with the four Pacific Northwest states and the National Governors' Association as amici curiae, argues that the Planning Act represents an innovative program of cooperative federalism. Noting that the Appointments Clause was intended to prevent the accumulation of power in one branch of government, the Council asserts that "the innovative form of federalism at issue in this case better serves the concern of the Framers than

would a federally appointed council or a complete delegation of both planning and execution functions to the Administrator." Regardless of the accuracy of that assertion, the Council's position lacks a basis in the text of the Constitution. The members of the Council exercise significant authority pursuant to federal law. As a result, the system of federalism embodied in the Constitution gives the power to select Council members to the executive branch.

In essence, the Council is arguing that the allocation of powers and duties in the Constitution should be relaxed in this case for policy reasons. Similar arguments have frequently been rejected. During the Great Depression, for example, the government argued that the existence of a domestic emergency justified legislation that would otherwise be unconstitutional. See Belknap, The New Deal and

the Emergency Powers Doctrine, 62 Texas L.Rev. 67 (1983). The Supreme Court rejected that argument:

> Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believ that more or different power is necessary.

A.L.A. Schechter Poultry Corp v. United States, 295 U.S. 495, 528-29, 55 S.Ct. 837, [1378] 842-43, 79 L.Ed. 1570 (1935); see Belknap, supra, at 92-98.

More recently, the Supreme Court considered the validity of the legislative veto. Rejecting numerous policy arguments, the Court held that the legislative veto is unconstitutional. INS v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). In a dissenting opinion, Justice White focused on the functional utility of the legislative veto. Id. at

967, 103 S.Ct. at 2792 (White, J., dissenting). The majority rejected that approach:

> The choices we discern as having been made in the Constitutional Convention impose burdens on government processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consiously made by men who had lived under a form of govrnment that permitted arbitrary governmental act to go unchecked. There is no support in the Constitution or decisons of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Id. at 959, 103 S.Ct. at 2788 (citation omitted).

It is true that the legislative veto and the emergency powers doctrine involved constitutional issues different

from those at issue in this case. Nevertheless, those cases illustrate the importance of maintaining the basic structure set forth in the Constitution. See United States v. Woodley, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc) ("Changes in [the Constitution] must come through constitutional amendment, not through judicial reform based on policy arguments."). The Council cannot be upheld as an innovative form of cooperative federalism.

IV

Conclusion

Congress anticipated the possibility that the provisions for formation of the Council might be found unconstitutional. See 16 U.S.C. § 839h (specifically stating that the provisions creating the Council are separable). In fact, Congress provided for the alternative establishment of the Council as a federal agency if the

courts invalidated the creation of the Council as a compact. Id. § 839b(b)(1)(A). Under the alternative scheme, the governors of the four Pacific Northwest states may nominate the Council members subject to the approval of the Secretary of Energy. Id. § 839b(2). Similar schemes have been upheld. See United States v. Hartwell, 73 U.S. (6 Wall.) 385, 18 L.Ed. 830 (1867); Woodford v. United States, 77 F.2d 861, 863-64 (8th Cir. 1935). In this case, however, Congress has usurped the constitutionally delegated power of the executive branch by authorizing state governors to appoint the members of the Council. I would grant the petition for review and vacate the plan.